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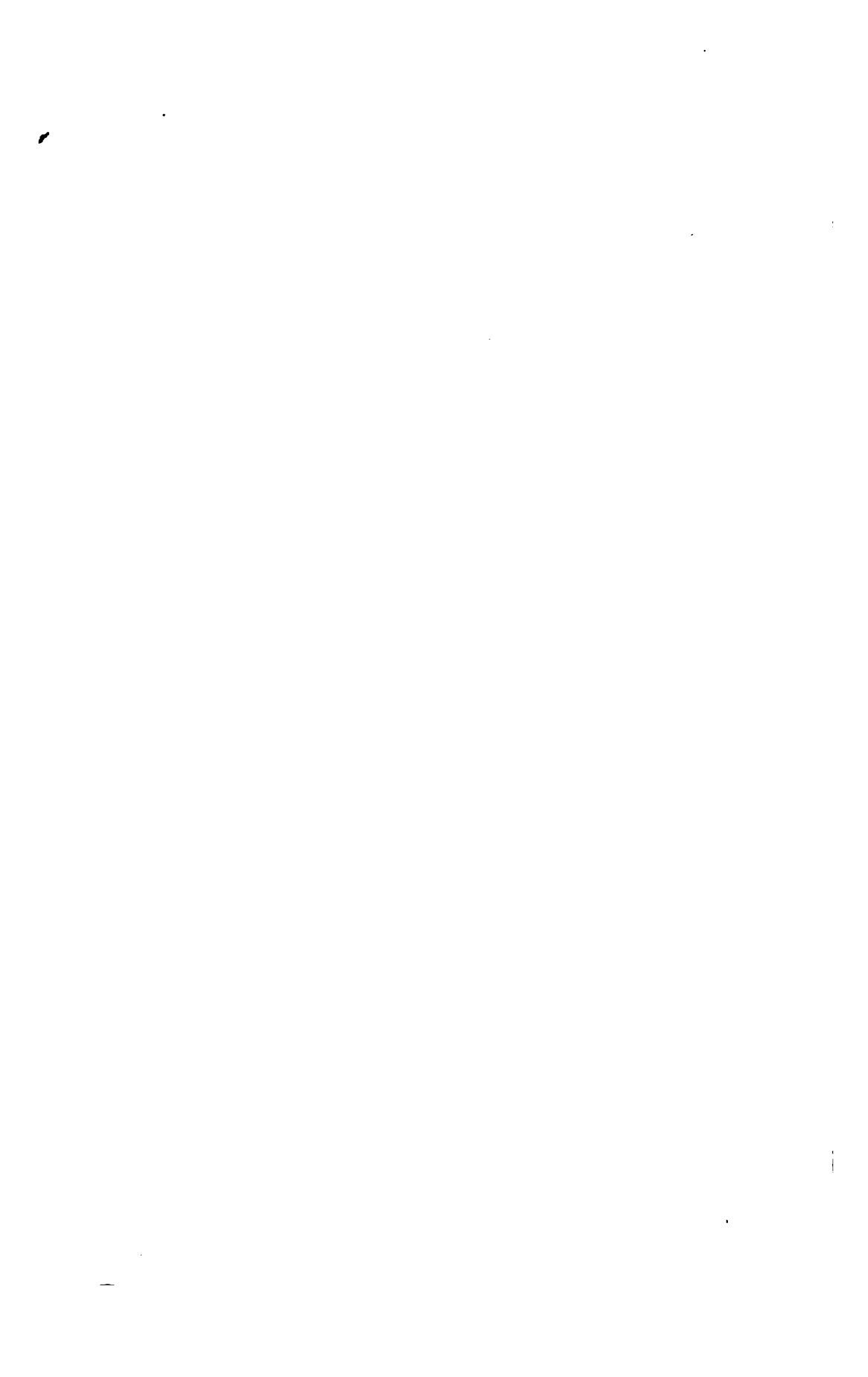
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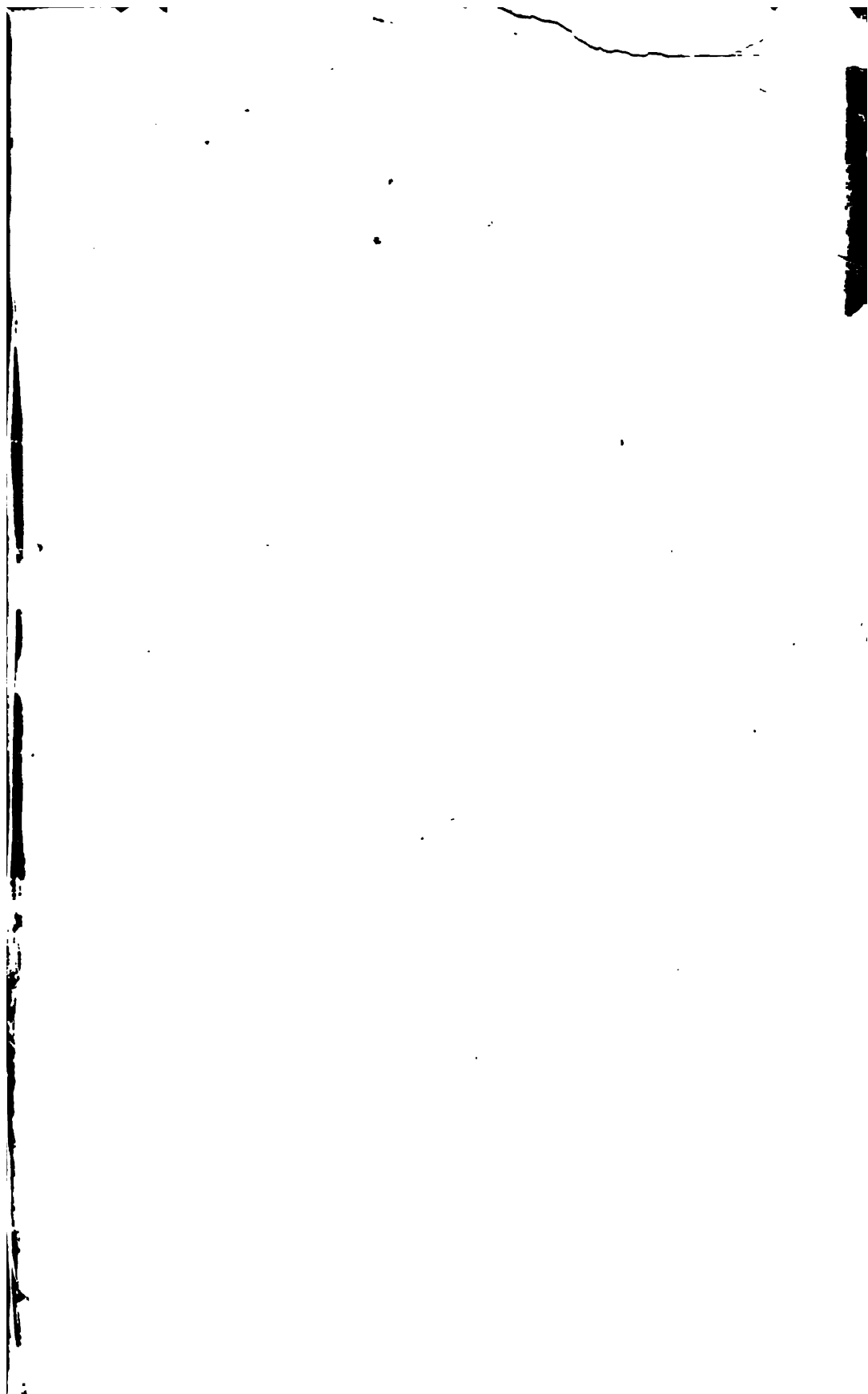


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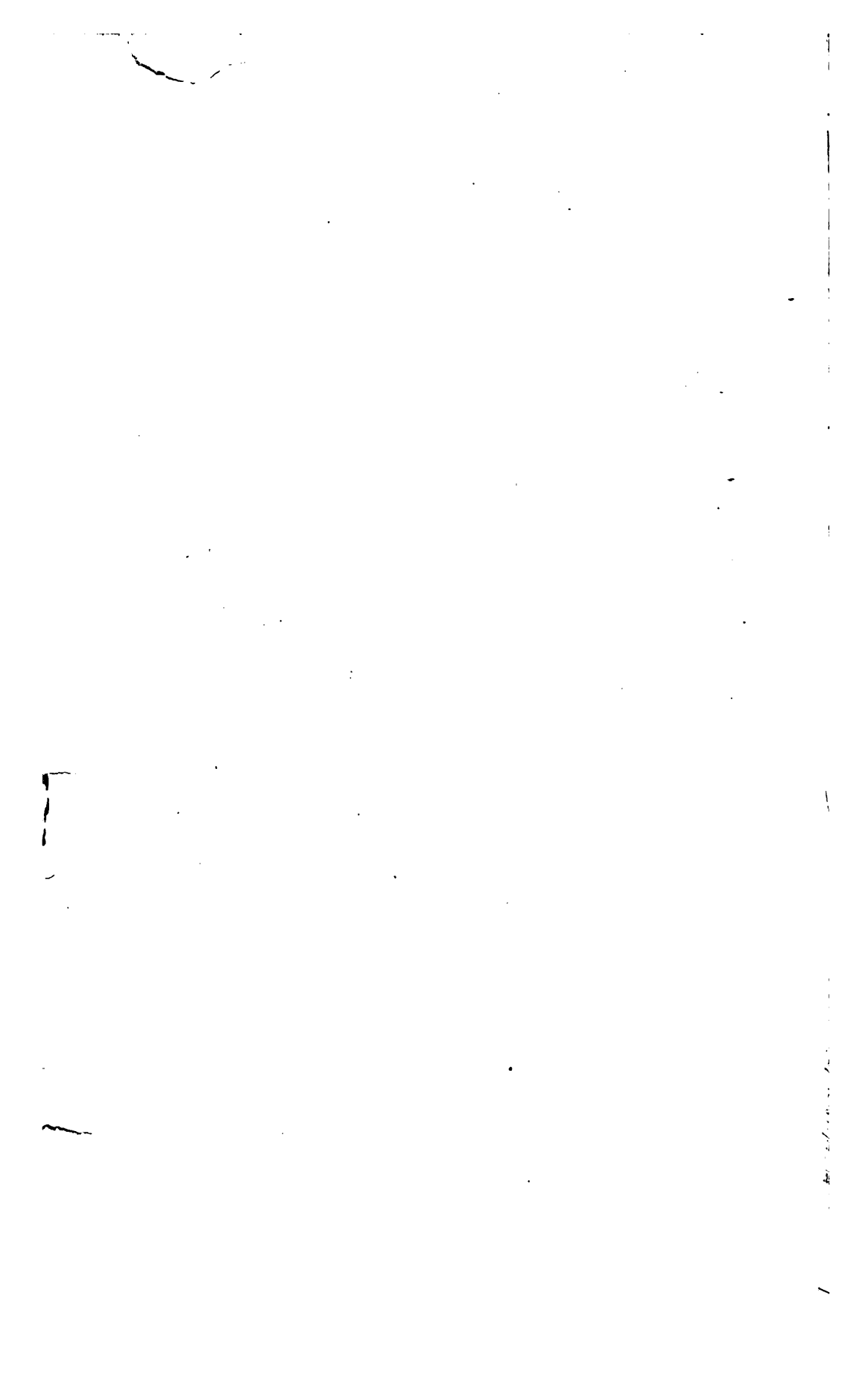
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| 128 <sup>1</sup> 2576 | 76 <sup>1</sup> 384   | 120 <sup>1</sup> 257  | 327 <sup>1</sup> 67   | 82 <sup>1</sup> 264  | 116 <sup>1</sup> 3199 | 90 <sup>1</sup> 3410  | 124 <sup>1</sup> 265  | 125 <sup>1</sup> 3494 |
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Continued.





July 9

36

# REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

## COURT OF APPEALS

OF THE

STATE OF NEW YORK,

WITH

NOTES, REFERENCES, AND AN INDEX.

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BY SAMUEL HAND,  
COUNSELLOR-AT-LAW.

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## JUDGES OF THE COURT OF APPEALS.

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SANDFORD E. CHURCH, CHIEF JUDGE.

WILLIAM F. ALLEN,

RUFUS W. PECKHAM,

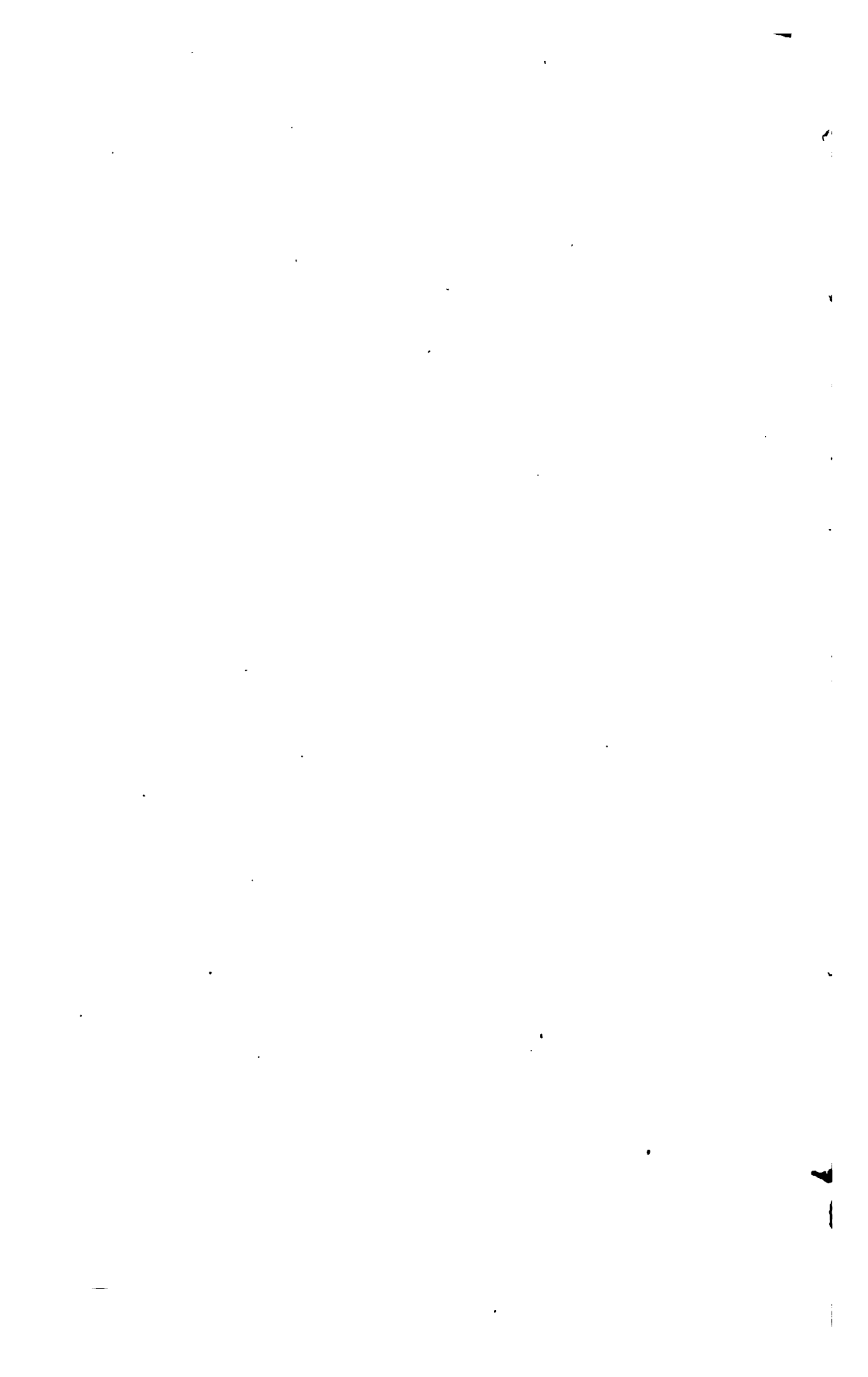
MARTIN GROVER,

CHARLES J. FOLGER,

CHARLES A. RAPALLO,

CHARLES ANDREWS,

*Associate Judges.*



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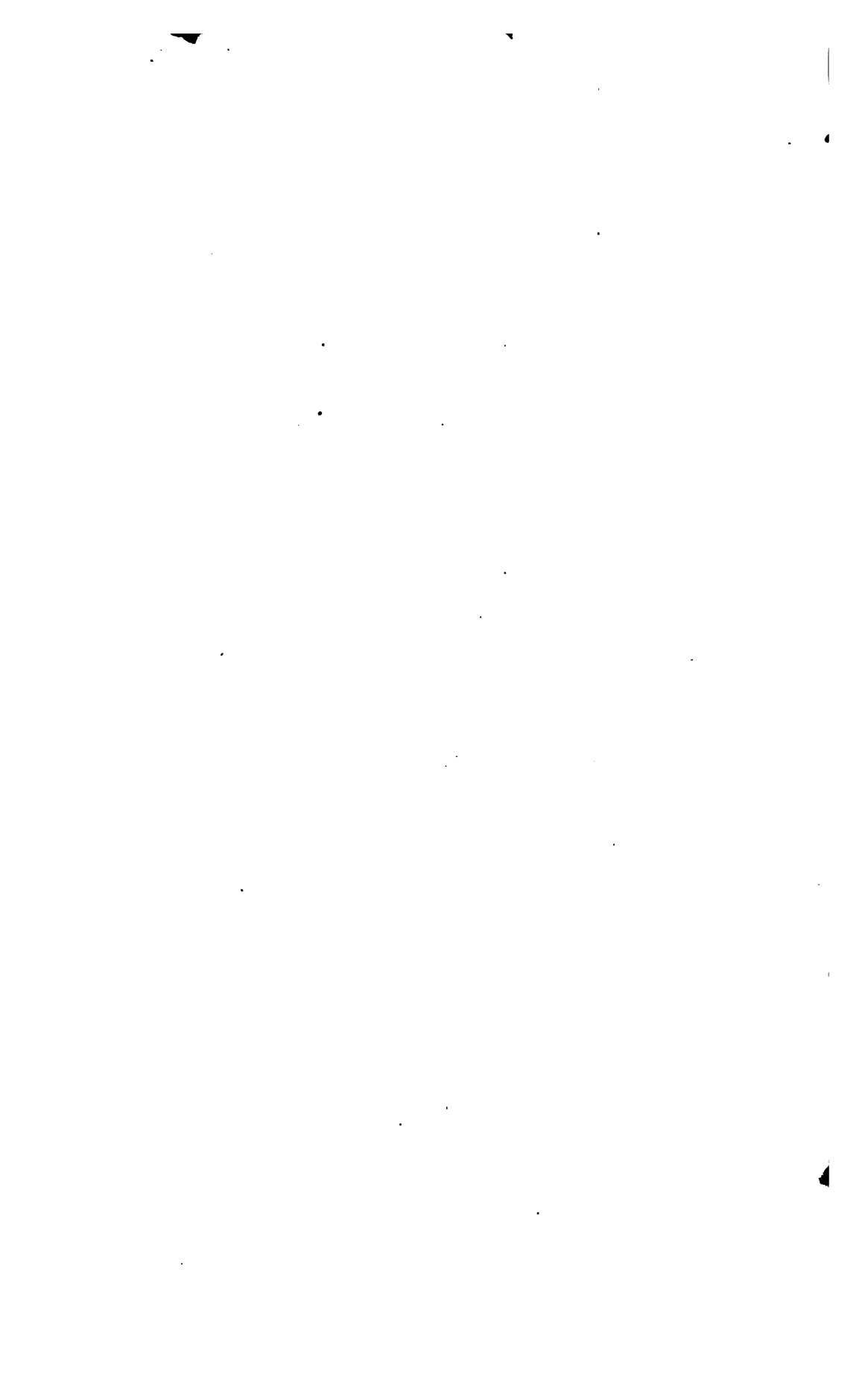
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## ERRATA.

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Page 102, head note, for "1818" read "1818."

Page 102, for "1818" read "1818."

Page 140, 12th line from the bottom, for "authorized" read "unauthorized."

Page 180, head note, 8th line, insert a comma after "such."

Page 205, 17th line, for "Sackridge" read "Sackrider."

Page 207, head note, 12th line, for "is" read "his."

Page 254, head note, for "Dash v. Van Kleek" read "Van Kleek v. Dutch Church."

Page 333, for "Appeal from" read "Error to."

Page 407, in last line, before "decreed" insert "and."

Pages 468-478, in title of case, for "Railroad" read "Railway."

Page 494, head note, 9th line, for "on" read "no."

Page 494, head note, 10th line, for "against" read "a good."

Page 494, head note, 10th line, for "Burt v. Dan" read "Burt v. Dewey," and add "distinguished."

Page 514, head note, 7th line, for "even" read "to every."

Page 706, 10th line, for "R. S." read "R. L."



# C A S E S

ARGUED AND DETERMINED IN THE

## COURT OF APPEALS

OF THE

### STATE OF NEW YORK,

FROM FEBRUARY TO JUNE, 1871.

JOSEPH MESSNER, Plaintiff in error, *v.* THE PEOPLE, Defendant in error.

Upon the return of a writ of error to the Oyer and Terminer, the Supreme Court has no power to order the cause to be heard on the reporter's minutes taken upon the trial against the objections of the prisoner, although no bill of exceptions had been made or returned. (GROVER, J.)

Upon the trial of the prisoner for the murder of his wife, a witness for the people, who had heard cries proceeding from the house of the prisoner in the night preceding her death, was permitted to testify what these cries indicated, whether the person was crying from joy or grief.—*Held* error, and that the question called for the conjecture of the witness as to the cause of the cries, and not for a description of them. (PECKHAM and ALLEN, JJ., *contra*)

Statements made by the deceased shortly preceding her death, in the absence of the prisoner, are not admissible in evidence against him. Where the record failed to show that the prisoner was asked by the court, after the verdict was rendered and before judgment was pronounced thereon, what he had to say why judgment should not be pronounced against him, or that any opportunity was given him by the court at this stage of the proceedings for that purpose.—*Held*, that this omission was error, for which there must be a new trial. (PECKHAM and ALLEN, JJ., *contra*.)

(Decided February 7, 1871.)

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## Statement of case.

Writ of error from the judgment of the General Term of the Supreme Court in the seventh judicial district, affirming the conviction of the prisoner at the Monroe county Oyer and Terminer.

The defendant was indicted at the October term, in 1868, of the Oyer and Terminer in Monroe county, for the murder of his wife. He was tried at the April term, 1869, and convicted and sentenced to be hanged on the 4th of June, 1869. On the 16th of June a writ of error was allowed to the Oyer and Terminer and a stay of execution granted.

No bill of exceptions having been signed or sealed as provided by the statute, the district attorney, at a General Term of the Supreme Court, moved that court that the argument for a new trial be heard upon the reporters' minutes taken on the trial. The counsel for the prisoner opposed the motion, but it was granted. The case was argued and the judgment of the Oyer and Terminer affirmed, and at the term of the Oyer and Terminer, held October 22d, the prisoner was again sentenced to be hanged, December 10, 1869. December 9, 1869, a writ of error with stay of execution was granted by Judge Grover. Evidence to the introduction of which defendant objected, is sufficiently stated in the opinion of the court.

*M. B. Champlain*, attorney-general, for the people.

*George E. Ripsom*, attorney for plaintiff in error, with *W. H. Cheseboro* and *L. B. Proctor* of counsel, insisted that the record must show that defendant was in court and asked by the judge presiding what he had to say why judgment should not be pronounced against him. (*Rex v. Geary*, 2 Salk., 630; *King v. Speke*, 3 Salk., 358; 1st Chitty Crim. Law, 700; Comyn's Digest "Indictment N."; Batscomb's Case, 3 Modern R., 205; *King v. Garrick*, 2 Adolph. & El., 266; *Safford v. The People*, Parker's Crim. R., vol. 1, 474; Black. Com., vol. 4, 376; Barbour's Crim. Law, 330; 1 Archbold Cr. Plead., 180-1; 3 Am. Cr. Law, § 3197; *Dunn v. The Com.*, 6 Barr,

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Opinion of the Court, per GROVER, J.

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(Penn.), 381 ; *Hamilton v. The Com.*, 4 Harris (Penn.), 129.) That the exceptions to admission of evidence were well taken. (*Weeks v. Lowerre*, 8 B., 530 ; *Osgood v. Manhattan*, 3 Cow., 612 ; *Stanley v. Whitehead*, 12 Wend., 55 ; *People v. Hartung*, 17 How., Pr. R., 151.)

GROVER, J. The case shows that the Supreme Court, upon motion of the district attorney, ordered the cause to be heard upon the reporter's minutes taken upon the trial of the prisoner, at the present term of the court, although such motion was opposed by the prisoner. This order was not authorized by law. Section 21, vol. 2, R. S., 736, gives to a defendant, on the trial of any indictment, the right to except to any decision of the court in the same cases and manner provided by law in civil cases, and provides that a bill thereof shall be settled, signed and sealed, and shall be filed with the clerk of the court and returned upon a writ of error, as theretofore authorized in personal actions. The cause is to be heard upon the exceptions so settled, signed, sealed and returned upon the writs of error, and the law does not authorize the substitution of the reporter's minutes for these exceptions. The latter are to be carefully settled by the trial court, and the performance of this duty by the court is equally important to the due administration of justice as any other with which the court is charged. To substitute for the bill of exceptions, which the court is to see is made in exact conformity with the truth, the notes taken by a reporter upon trial, unrevised, perhaps, by him, and certainly not corrected by the court, would be hazardous both to the rights of the people and the accused. Such a practice must be condemned. It is a dangerous departure from the safe course furnished by statute. The prisoner was compelled by the court to have his cause heard upon this paper, and the judgment of the Supreme Court has been based thereon. It is manifest that the plaintiff in error might have come into this court and procured the reversal of the judgment of the Supreme Court affirming the judgment of the Oyer and Terminer, leaving

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Opinion of the Court, per GROVER, J.

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the latter judgment unreversed, but removed into the Supreme Court by the writ of error, and in that event it would have been the duty of the Supreme Court to rehear the case upon exceptions properly settled by the court, if any such were returned with the writ. But the plaintiff in error has not adopted this course. He insists that the minutes, having been substituted for the bill of exceptions by the Supreme Court against his consent, and the case heard thereon, he has the right to waive the legal error committed by the Supreme Court in substituting the minutes for a legal bill of exceptions, and to demand the judgment of this court upon the question whether regarding the minutes as a bill of exceptions, that court did not err in affirming the judgment of the Oyer and Terminer. His counsel argues that the Supreme Court had jurisdiction to hear and determine the cause when brought before it by writ of error; that this included the power of determining upon what papers it should be heard; that an error in this respect did not deprive the court of jurisdiction, but was a mere legal error which the party against whom it was committed was at liberty to waive, and which, after waiver by such party, is to be disregarded. Without passing upon this question, we have concluded that in this case, being capital, we would examine the minutes and the questions presented therein in a manner somewhat more liberal than upon a bill of exceptions settled pursuant to the statute, so far as the exceptions taken to the rulings of the court are concerned. Upon the trial, the counsel for the people proved by a witness that he heard cries at the house where the prisoner and his wife (the deceased) lived on the Saturday night preceding her death. The counsel for the people then asked the witness what those cries indicated, whether the person was crying for joy or what. The prisoner's counsel objected to this question. The objection was overruled, and an exception taken. This question clearly called for the conjecture of the witness as to the cause of the cries and not for a description of them. The former was incompetent. The latter was not. To this the witness

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Opinion of the Court, per GROVER, J.

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answered that it seemed to him she cried for help; that he did not think she did it for pleasure. It was for the witness to describe the cries, so as to give the jury as correct an idea of them as possible, and then for the latter to draw such inferences therefrom as in their judgment were warranted.

The counsel for the people introduced Mrs. Laird as a witness, and proved by her that the prisoner and his wife came to her house on the Sunday preceding her death; that the witness examined the head of the deceased in the absence of the prisoner and found a lump thereon, and that the right shoulder was black; that the deceased kept threatening all day to get him arrested. There was an objection taken to this evidence, but from the papers it is a little obscure whether it applied to the whole or to what part of it. What the witness discovered upon examining the head and shoulder of the deceased was competent evidence. What she said in his absence, whether by way of threat or otherwise, was incompetent. Its effect was injurious to the prisoner by creating a belief in the jury that he had inflicted violence upon her, causing the injuries discovered by the witness.

The record fails to show that the prisoner was asked by the court, after the verdict was rendered and before judgment was pronounced thereon, what he had to say why judgment should not be pronounced against him, or that any opportunity was given to him by the court, at this stage of the proceedings, for that purpose. This omission was error. It deprived the defendant of a substantial legal right. It was his right, at this stage, to move in arrest of judgment for any legal defect in the indictment or other proceedings, to show that the verdict was vitiated and should be set aside for the misconduct of the jury or for any other legal reason, or to plead a pardon. This has been the settled legal rule from the earliest history of the common law. This appears from the case of *The King v. Geary* (2 Salkeld, 630). Geary was attainted of high treason on an indictment, to which he pleaded guilty. Upon error brought to reverse this attainder, the exception taken was that it did not appear that he was asked what he had to say

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Opinion of the Court, per GROVER, J.

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why judgment should not be given against him, and the report of the case shows that the precedents were searched and all found to show this fact, and the court held the exception good, for he might have matter to move in arrest of judgment, etc., and the attainder was reversed. This case arose in the reign of William and Mary, and the report shows that the law had for a long period been that it was a substantial legal right of the prisoner to show cause, if any he had, why judgment should not be given against him upon a verdict or confession of an indictment, and that the record must show affirmatively that the court had given him an opportunity to exercise it. The like judgment for the same reason was given by the King's Bench in *The King v. Speke* (3 Salkeld, 358). The same judgment for the like reason was given in a case reported *Anonymous 3d Modern*, 265. In 1st Chitty Criminal Law, 700, it is said that "it is now indispensably necessary, even in clergyable felonies, that the defendant should be asked by the clerk, if he has anything to say why judgment of death should not be pronounced on him, and it is material that this appear upon the record to have been done, and its omission after judgment in high treason will be a sufficient ground for the reversal of the attainder. The necessity of the record showing that this right was given to the prisoner by the court is laid down as applicable to all cases, and no reason whatever can be given why its omission in the record should be any more fatal in cases of high treason than in other capital cases. The only reason why the omission is said to be fatal in the former, while silent as to the consequence in the latter, is that the question had repeatedly been raised and determined in the former; but it does not appear to have arisen in the latter. It is obvious that the same reasons for the rule apply alike to all capital cases, and when these are the same, the rule must be the same. The same doctrine will be found in Comyn's Digest, vol. 4, indictment N; 4th Blackstone, 376; Barbour's Crim. Law, 330; Archibald's Crim. Practice and Pleading, vol. 1, 180, 181. The question has rarely arisen in this country, for the reason, probably,

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Opinion of the Court, per GROVER, J.

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that the law was so fully settled and thoroughly understood that it has been almost universally observed in practice. See *Safford v. The People* (1st Parker's Crim. Cases), where the question arose and was somewhat elaborately discussed by HAND, J. These and other authorities that might be cited conclusively show that it is indispensable that the record should show in capital cases that the prisoner was required to show cause, if any, why judgment should not be awarded against him; that it is the duty of the court to hear and determine the sufficiency of such cause as much as to pass upon any other question during the trial. Indeed this may be regarded as a part of the trial, as it is an essential prerequisite to an adjudication of the guilt of the prisoner. The court has no more power to dispense with this rule or disregard it than it has any other legal rule, which the wisdom and experience of ages has found necessary for the protection of the innocent. It may be that the prisoner has sustained no injury from the non-observance of the law in the present case. But that is not the question for this court. That question is whether the record shows that the prisoner has been convicted of murder in the first degree in the mode prescribed by law. If it does, the judgment should be affirmed and execution done as the law requires. But if the record fails to show that he has been so convicted or that all the opportunities of showing his innocence given him by law have been given to him by the court, the judgment must be reversed and a new trial had. It is argued by the counsel for the people that the objection is obviated by chap. 226, Laws of 1863. That chapter contains but a single section amending section 24, article 2d, title 8, chap. 2, part 4, of the Revised Statutes, by adding the following words: Provided, however, that the appellate court shall have power, upon any writ of error, when it shall appear that the conviction has been legal and regular, to remit the record to the court in which such conviction was had, to pass such sentence thereon as the said appellate court shall direct. The object of this amendment was to provide for cases where it appeared that it was legal for

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Dissenting opinion, per PECKHAM, J.

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the court to give judgment; but that in the giving thereof error had intervened and a sentence passed different from that required by law. In such cases the amendment makes it the duty of the appellate court to reverse the judgment and remand the case with directions to pass such sentence as required by law. But that is clearly not this case. The court never gave the prisoner the opportunity of showing cause why the verdict should not be set aside or the judgment thereon arrested. It was not, therefore, legally proper to proceed to judgment. For aught that appears the prisoner may have a legal reason to show why judgment should not pass against him. Should this court remand the case prescribing the judgment to be rendered, the prisoner will be deprived forever of all opportunity of presenting such reason, if any, to the consideration of the court. The judgment must be reversed and a new trial ordered.

CHURCH, Ch. J., FOLGER, RAPALLO and ANDREWS, JJ., concurred.

ALLEN, J., read an opinion for reversal of judgment on the ground of failure to ask the prisoner if he had anything to say why sentence should not be pronounced, and remitting proceedings to Court of Oyer and Terminer to give judgment on the conviction.

PECKHAM, J. (dissenting). I am compelled to dissent. If there were no bill of exceptions before the Supreme Court, that court committed no legal error in looking at a paper they called a bill, as they found no error in it. It was a perfectly harmless thing; just as harmless as if they had looked for error on the lawn adjoining the court-house, and found none. It was no part of the duty of that court to make or settle a bill of exceptions. It was the exclusive duty of the prisoner's counsel to prepare the bill, if he had any faith in the case, and of the Court of Oyer and Terminer (not of the Supreme Court) to settle it, when presented for that purpose. The case does not show that such a bill was ever prepared or presented.



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Dissenting opinion, per PECKHAM, J.

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It was the clear right of the Supreme Court, at the instance of either party, to order to argument any cause pending there for that purpose.

If they gave the prisoner the benefit of a literal, *verbatim* report of the trial, contained in a copy of the reporter's notes, called it a bill of exceptions, and examined it, as if it were a legal bill, to see if the prisoner had sustained any legal prejudice, surely the prisoner cannot complain. He had made no bill of exceptions, as it was his duty to do, if he desired it, before the case was brought into the Supreme Court. If the reporter's notes had been struck out, he was left there with the simple record of conviction.

Nor can the prisoner come here and insist that this court shall look at this claimed bill of exceptions, with more liberality, because his counsel omitted to prepare it or have it settled.

If there be no bill of exceptions here, it is clear that this court has no legal authority, no jurisdiction, to reverse this judgment upon a pretence that there is a bill here. We cannot make one. We have as little right (if we call it a bill at all) to interpret it otherwise than we do any other bill of exceptions. We cannot legally usurp executive functions, and set aside the judgment upon statements not in the bill, either from sympathy or "liberality" of construction.

There was no error in allowing the witness to answer whether the cry he heard of "Oh, Joe!" for some little time, was a cry of joy or distress; whether it indicated joy or agony.

The witness answered, "he did not think she did it for pleasure."

The difference is easily perceived, but almost impossible to describe. To exclude such testimony would exclude evidence of a "groan," and compel a witness to describe the noise.

This was on Saturday night, as she was killed on Monday morning following.

But if there was error in allowing this question, this court would commit a greater error, if it reversed the judgment for that cause.

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Dissenting opinion, per PECKHAM, J.

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It is well-settled law, that "a verdict will not be set aside on bill of exceptions, though there was error on the trial, if the error was such that it could do no legal injury." (*Shorter v. The People*, 2 Comst., 193; *The People v. Gonzales*, 35 N. Y., 49.) The above were both capital cases.

The first related to an error in the charge of the judge; the second to the admission of improper evidence; and it was held that, when the fact which that evidence tended to prove was independently established by undisputed and competent evidence, and thus no injury could have resulted to the prisoner, this court had no authority to reverse the judgment on that ground.

The tendency of this evidence, as claimed by the prisoner's counsel, was to prove that the prisoner was maltreating or beating his wife on that Saturday night.

Yet it is independently proved, by two witnesses, that, on Sunday, the next day, she charged him with beating her on Saturday night, and breaking a stool over her head. He admitted the beating, but insisted that the stool did not break, but that the legs came out; but he said, "I broke her comb." Other maltreatment at the same time was proved in the same manner.

There is no other objection in the bill of exceptions of sufficient moment to allude to.

Mention was made of a witness describing a bunch on the head of deceased, as if to allow the inference that the prisoner had made it. This was not left to inference. The witness testified that she said he did it, in his presence, and the prisoner did not deny it.

It is urged that the record is fatally defective, in omitting to state that the prisoner was asked, if he had anything to say why sentence should not be pronounced upon him.

This ceremony was required in England at a time when prisoners were not allowed counsel. Hence this inquiry; so that, if the prisoner had received a pardon, he might plead it, or he might move in arrest of judgment. These are the reasons assigned for the rule. No case has been found in Eng-

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Dissenting opinion, per PECKHAM, J.

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land where the omission to make the inquiry had been held ground for reversing the judgment, except in cases of treason. The rule is now generally laid down in elementary writers, that, in treason (not in other felonies), the conviction will be reversed for its omission. The reversal is confined to cases of treason.

In this State, there was never the slightest reason for the rule. Prisoners have always had counsel here; and this inquiry was never necessary to enable them to plead a pardon or move in arrest. Here the prisoner is allowed a bill of exceptions to review decisions at the trial, as in civil cases. His rights are abundantly and carefully secured. No bill of exceptions is allowed in England; no new trial is authorized there.

We all know that this inquiry, so far as any legal effect is concerned, is here utterly idle. Not a case in our books shows that the rule was ever adopted here. The prisoner here, I may say, never makes the motion in arrest—never pleads a pardon. It is done by his counsel, and he does not wait to be inquired of, before moving. He moves, or pleads, in season or out of season. If the prisoner have capacity to defend himself, and prefer to do so, he takes the like course.

If this judgment be set aside, therefore, upon this ground, it is for the purpose of allowing this prisoner, in person, not by counsel, to make a motion, or put in a plea, which, every lawyer knows, he never will do. If he had any cause for either, his counsel would have done it. Yet, for the omission of this idle ceremony, this judgment is to be set aside, and the whole merits again tried. For this idle ceremony, the rule of England is to be extended further than any case has carried it there; further than any elementary writers extend it. Besides, if he had any ground whatever for motion in arrest, it would appear in this record, on this writ of error, and he could reverse the judgment on that ground now; as, whatever is ground for arrest is now ground for error. (1 Chitty's Cr. Law, 5th Am. ed., pp. 751, 752.) But it affirmatively appears, on inspecting the record, that he has no such

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Dissenting opinion, per PECKHAM, J.

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ground; in fact, none is pretended. Again, if he had a pardon in this State, he could avail himself of it, even up to the gallows.

But, assume this inquiry to be necessary, then the statute of 1863 makes a new trial unnecessary. It provides that, where "the conviction has been *legal and regular*, the appellate court shall have power to remit the record to the court in which such conviction was had, to pass such sentence thereon as the appellate court shall direct." (Laws of 1863, p. 406.) "Conviction," in this statute, means "when the jury find him guilty. He is then said to be convicted of the crime whereof he stands indicted." (4 Bl. Com., 362; 1 Bouv. Law Dict., 282.) But this is not denied. In fact, "conviction" is so used generally in statutes, as to punishments.

When the "conviction," then, has been "legal and regular," and some illegality or irregularity afterward intervened, it may be corrected by a regular and proper sentence, without the absurdity of a long trial on the merits again, in order to pronounce the sentence properly.

It is said that, if a wrong sentence had been passed, we might direct a right one. But, if the right sentence had been irregularly passed, the statute gives us no authority. That qualification may be found in the court. It is not in the statute. Its only qualification is, if the "conviction has been legal and regular," then we may remit, and direct the court to do — what? to "pass such sentence as the appellate court shall direct." The act provides a remedy for an irregular sentence, as plainly and in terms, as it does for an erroneous sentence, and with precisely the same reason. The object of the statute seems very plain. It is to correct any irregularity or illegality occurring after the conviction, when the merits have been fully tried. It is to correct the point where there had been illegality, without touching the merits, when there had been none, as to their trial. When people were hung for petit larceny, courts might well speak *in favorem vitæ*. But now, when punishments are proportioned to offences, I see no

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Statement of case.

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reason for seeking to shield the highest criminals, while the petty offenders are punished with rigor.

Where human life is in issue, greater care and caution should be exercised, to get at the truth, to arrive at a right result. When that is found, no more favor should be shown to the willful murderer than to the petty thief. But the penalty due to each should be declared with the same impartial justice.

I have been able to find no error in the trial of this prisoner, or in the record thereof. The judgment should be affirmed.

Judgment reversed, and new trial ordered.

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ABRAM WITBECK, Respondent, v. ALEXANDER HOLLAND,  
Treasurer of the American Express Company, Appellant.

Common carriers by land are ordinarily bound to deliver or tender the goods to the consignee at his residence or place of business; but when the consignee cannot be found with reasonable diligence, the common carrier may relieve himself from liability by depositing the property in a suitable place for the owner.

Carriers by vessels and railways, having transported the goods to their dock or station nearest to the residence of the consignee, and notified him of their readiness to deliver, are not bound to make personal delivery, but this exemption does not extend to express companies.

When there is a conflict of evidence, reasonable diligence is a mixed question of fact and of law.

On the question of diligence in finding the consignee, evidence as to his being well known in the community is competent. GROVER, J.

(Argued February 9, and decided February 21, 1871.)

APPEAL from the judgment of the General Term of the Supreme Court in the fourth judicial district, affirming the judgment for the plaintiff, entered upon the report of the referee.

This action was tried before a referee, who found that the American Express Company was a joint stock association engaged in the general express business. That the plaintiff

## Statement of case.

was a soldier on Hart's Island, N. Y., who, having received his bounty money on the 3d December, 1864, took \$320 of it to the office of Adams Express Company, on that island, where it was counted, put in an envelope, sealed and addressed to "Martin Witbeck, Schenectady, N. Y., delivered to the agent of the company, who gave the plaintiff a receipt acknowledging the receipt of the package, "upon the special acceptance and agreement, that this company is to forward the same to its agent, nearest or most convenient to destination only, and there to deliver the same to other parties to complete the transportation, such delivery to terminate all liability of this company for such package," etc.

The package was delivered by the Adams Express Company on the 5th December, 1864, to the American Express Company at its office in New York, and a receipt was given to the Adams Express Company as follows:

Received, New York, December 5, 1864, of Adams Express Company (per bills), in good order, the following articles set opposite our respective names.

| ARTICLES. | Dollars. | Cents. | Consignee.      | Where from. | Destination.       | Amount charged. | By whom received. |
|-----------|----------|--------|-----------------|-------------|--------------------|-----------------|-------------------|
| Pck.      | \$320    |        | Martin Witbeck. | H. I.       | Schenectady, N. Y. | \$1 75          | Myers.            |

Myers was the agent of the American Express Company at New York. The plaintiff, December 8, 1864, enclosed the receipt in a letter to his brother Daniel Witbeck, who resided at Schenectady, which letter and receipt were received by Daniel Witbeck as an advertised letter about the middle of February, 1865.

There was at the time no contract or business connection between Adams Express Company and the American Express Company, except that they took parcels, goods, etc., for each other for transportation and delivery along their respective routes of business. The American Express Company delivered the package to its local agent at Schenectady, December 6, 1864. Martin Witbeck, the consignee of said package, resided with his wife at Schenectady, at the time of

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Statement of case.

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the arrival of the package at Schenectady, and until after January 14, following.

The agent of the American Express Company did not know Martin Witbeck, and, when the package arrived, looked at the directory and did not find his name in it. The next day the agent filled up a notice and addressed it to Martin Whitbeck, Schenectady, and deposited it in the post-office. Between one and three days thereafter, the agent inquired of two men, conductors upon the N. Y. Central Railroad, running from Schenectady to Troy, and also inquired of John Bradt, the city treasurer of Schenectady, whether they knew Martin Whitbeck, and they replied they did not.

The agent made no further effort to find the consignee, and the package was deposited in the company's iron safe in its office till January 17, 1865, when the office was burglariously opened in the night, the safe blown open, the package abstracted and stolen and has never been recovered.

The notice put in the post-office, was not received by Martin Witbeck, though inquiries were made several times at the post-office while it was there, by his wife and father, for letters for themselves and for him.

The referee decided, among other things, that the American Express Company was bound to deliver the package to Martin Witbeck, personally, or at his residence or place of business; that the American Express Company did not make due effort to find Martin Witbeck, or his residence or place of business; that the plaintiff was entitled to judgment for \$320, with interest from December 7, 1864.

From the judgment entered upon the report the defendant appealed to the General Term, where it was affirmed, and from such judgment of affirmance this appeal was taken.

*Hooper C. Van Vorst*, for the defendant and appellant, cited, to show that the delivery of the package by Adams Express Company to the American Express Company was as forwarders only, *Lamb v. Camden and Amboy R. R. Co.* (2 Daly, 455); *Manhattan Oil Co. v. Same* (52 Barb., 72).

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Opinion of the Court, per GROVER, J.

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That personal delivery need not be made, when consignee cannot be found on due inquiry, *Fisk v. Newton* (1 Denio, 45); Angell on Carriers, § 295, and cases cited; *Ostrander v. Brown* (15 Johns., 39); *Rowland v. Miln* (2 Hill, 150); Redfield on Railways, vol. 2, p. 76, § 175, par. 18-20; *Hamilton v. Nickerson* (11 Allen, 303). That the American Express Company held the package as a warehouseman, Angell on Carriers, §§ 79, 302; Story on Bail, §§ 446, 449; Parsons on Contracts, 617; *Platt v. Hibbard* (7 Cow., 497); *Knapp v. Curtis* (9 Wend., 60).

*John L. Hill*, for the plaintiff and respondent, cited, to show that persons receiving packages for transportation were common carriers, *Sherman v. Wells* (28 Barb., 403-409); *Russell v. Livingston* (19 id., 346, 355); *Hooper v. Wells* (5 Am. Law Reg., N. S., p. 2); *Sweet v. Barney* (23 N. Y., 337); Article by Mr. Redfield, 5 Am. Law Reg., N. S., p. 2. That package was received by defendant's company as a common carrier, *Lakeman v. Grinnell* (5 Bosw., 625). That the American Express Company was bound to make personal delivery, Edwards on Bailments, 54; 1 Parsons on Contracts, 657, note *m*, and cases cited, 5 Am. Law Reg., N. S., p. 7, and cases; Redfield on Railways, § 127; *Haslam v. Adams' Ex. Co.* (6 Bosw., 235). As to distinction as to carriers by canal, river, and railway, Redfield on Railways, § 127; 5 Am. Law Reg., N. S., p. 7; 2 Kent Com., 774-776 [604] and notes; *Thomas v. Boston and Providence R. R. Co.* (10 Metc., 472); *Chickering v. Fowler* (4 Pick., 37). That the defendant did not use sufficient diligence, Edw. on Bailments, pp. 67, 96, 97, 98, 102-108; Jones on Bailments, 40-93; *Wilson v. Brett* (Mees. & Wels., 13); *Fellows v. Gordon* (8 B. Monr., 415).

GROVER, J. The facts found by the referee showed beyond question that the defendant was a common carrier, and responsible, as such, for property delivered to it for transportation. This finding was warranted by the evidence. It was engaged in transacting a general express business. It



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Opinion of the Court, per GROVER, J.

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is insisted by the counsel for the defendant that its liability was restricted by the contract, proved by the receipt given by the Adams Express Company to the plaintiff, upon the receipt of the money from him by it at Hart's Island. From this receipt, it appears that the latter company undertook to forward the package to its agent nearest to its destination, there to deliver it to other parties to complete the transportation, such delivery to terminate all liability of that company for its passage. There is nothing in this or any other restriction at all affecting the liability of the defendant as a common carrier; all the restrictions found in the receipt are by the language limited to the liability of the Adams company. Indeed, were they applicable to the defendant, they would not affect the liability of the defendant in the action, as they do not include the cause of the loss, unless they relieve the carrier from the duty of delivery to the consignee. The first inquiry is, whether it was the duty of the carrier so to deliver the package in the absence of any restriction. Carriers by land are bound to deliver or tender the goods to the consignee at his residence or place of business, and until this is done they are not relieved from responsibility as carriers. (2 Kent's Com., 605; Angel on Carriers, § 295; *Gibson v. Culver*, 17 Wend., 305; *Fisk v. Newton*, 1 Den., 45.) But when goods are safely conveyed to the place of destination, and the consignee cannot, after reasonable effort, be found, the carrier may discharge himself from further responsibility by depositing the property in a suitable place for the owner. (*Fisk v. Newton*, *supra*.) Carriers by vessels, boats and railways are exempt from the duty of personal delivery. (Redfield on Railways, § 127; *Thomas v. Boston R. R. Co.*, 10 Metcalf, 472.) Such carriers discharge themselves from responsibility, as such, by transporting the goods to their nearest business station to the residence or place of business of the consignee, and notifying the consignee of their readiness to deliver the goods at such station, after the lapse of a reasonable time for him to receive them. But this exemption does not extend to express companies, although availing themselves of carriage

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by rail. (Redfield on Railways, § 127.) These were established for the purpose of extending to the public the advantages of personal delivery enjoyed in all cases of land carriage prior to the introduction of transportation by rail.

It appeared in the present case that the defendant had its vehicles by which they carried articles to the consignees in the city of Schenectady, which had arrived there by rail under contracts with the company for the transportation. This is the usual course of transacting business by such companies; were it otherwise, the business done by these companies would be greatly diminished, as it would be equally advantageous in many cases to have the property transported by the railroad company. When the defendant received the package from the Adams Company at New York, consigned to Martin Witbeck, Schenectady, it became liable as carrier for its carriage to Schenectady and its delivery to Witbeck there, if with reasonable diligence he could be found. The performance of this entire service was contracted for by its receipt so addressed, and had the defendant received it from the plaintiff at New York and given him a receipt for its transportation, the obligation to make personal delivery at Schenectady, would have been incurred. The only remaining question arises upon the exception taken to the finding by the referee, as a fact, that the defendant did not make due effort, nor use due diligence to find said Martin Witbeck, the consignee of said package. It is insisted by the counsel for the appellant, that the question, what is reasonable diligence, is one of law. That may be so, when there is no conflict in the evidence, or controversy as to the facts to be inferred therefrom. But that is not this case, nor will most cases of this class be of that description. In most, if not all, the questions will be mixed, both of fact and law. In the present case the finding of the referee was clearly correct. The diligence, which the law required of the defendant, was such as a prudent man would have used in an important business affair of his own. The evidence shows that the defendant was so inattentive as to mistake the surname of the consignee.

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Statement of case.

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Although the package was addressed to Witbeck, all its inquiries were made for Whitbeck. This may have prevented their finding him. It further appeared that its inquiries were confined to a few persons in the vicinity of its place of business, and that by these it obtained information of other persons of a like surname, one of whom was the father of the consignee. Surely inquiry should have been made of these persons, and had it been so made delivery would have been made and the loss would never have occurred. There is nothing in the point that the negligence of the plaintiff in not giving further information as to the residence of the consignee contributed to the loss. The defendant accepted the package, addressed as it was, and failed in the performance of the duty imposed thereby. For such failure it is responsible, irrespective of the right of the plaintiff to give additional information. I have examined the various exceptions taken by the appellant to the rulings of the referee as to the competency of evidence. The question whether the consignee was well known in Schenectady was proper. The plaintiffs had the right to prove this fact if he could. But the testimony given in answer was not material. None of the testimony excepted to could have prejudiced the defendant. The judgment appealed from must be affirmed.

All the judges concurring judgment affirmed.

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BOARD OF WATER COMMISSIONERS OF COHOES, Respondent,  
v. JANE ANN LANSING, Appellant.

The report or certificate of an officer is evidence only of facts which, by law, he is required or authorized to certify.

Where appraisers are appointed to determine the value of property to be taken for public purposes, not only the examination must be had, but the determination must be made at a meeting, at which all are present.

(Argued February 8; decided February 21, 1871.)

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Statement of case.

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APPEAL from an order of the late General Term of the Supreme Court in the Third judicial district, confirming the report of the appraisers in proceedings taken by the respondents, the board of water commissioners of the village of Cohoes, to obtain the land of the appellant for the purpose of enlarging the water-works of the village of Cohoes, pursuant to chapter 177 of the Laws of 1856, as amended by chapter 744 of the Laws of 1868. This statute authorized the Supreme Court, on application, in case of disagreement between the water commissioners and the owner of any property, which may be required for the carrying out of the purposes of said act, to appoint three disinterested persons to examine the property, estimate the compensation, and report to the court what would be a just compensation for it.

On the 21st of September, 1868, an application was made to the General Term of the Supreme Court for the appointment of three disinterested persons to examine the property of Jane Ann Lansing, the appellant, and to report as to the compensation to be paid; and the court thereupon appointed three appraisers, Alva H. Tremain, David J. Norton, and Elias H. Ireland, who, after the examination of certain witnesses, when all were present, could not agree, and a report was afterward made and signed by Tremain and Norton, two of them, while Ireland submitted a minority report.

It appears by the affidavit of Ireland, the one of the appraisers who submitted the minority report, that he was not present when the report was made and signed by the other two; nor is there any evidence that he ever had notice that the other appraisers would meet for the making of their report, except that, in the report of the appraisers, Tremain and Norton, it is recited that all of the appraisers were present and acting.

*Lyman Tremain*, for the appellant.

*J. F. Crawford*, for the respondent.

## Opinion of the Court, per RAPALLO, J.

RAPALLO, J. The affidavit of Ireland, although not positive, in some of its statements, is sufficient, in the absence of any contradictory evidence, to show that he was not present when the decision of the two appraisers, who made the report was arrived at, or when the report was signed.

The unsworn certificate of the proceedings of the appraisers, and the statements of fact contained in their report, were not entitled to be considered as evidence upon that point.

The act of 1856 does not direct or authorize the making of any such certificate, nor is any authority given by the act to the appraisers to report anything except the sum which they may estimate. The report or certificate of an officer is evidence only of facts which by law he is required or authorized to certify. In this case the act simply required the three persons to examine the property and estimate a sum, and to report that sum.

The compensation in this case was fixed and the report made by only two persons. There was no competent evidence that they rendered their decision at a meeting at which the three were present, but the proofs presented to the court tended to establish the contrary. There is no ground, therefore, upon which the proceeding can be sustained, even if the rule that a majority can decide is applicable to a case of this description, when less than three concur in a decision.

It is consequently unnecessary to determine whether the act of 1856, by authorizing the appointment of three persons to *estimate* the compensation, complies with the requirement of the constitution, that the compensation be *ascertained* by not less than three commissioners, nor the further question whether, if such an estimate as is provided for by the act be sufficient, it is necessary that at least three appraisers should agree in the estimate.

The order appealed from should be reversed, and the motion to confirm the report should be denied, with costs.

All the judges concurring, order reversed.

## Statement of case.

GEORGE BLISS, Appellant, v. JOEL A. MATTESON and ELISHA C. LITCHFIELD, Respondents.

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142 415

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77 AD<sup>1</sup> 40  
77 AD<sup>2</sup> 41

Any agreement made by one creditor for some advantage to himself over other creditors, who unite with him in a composition of their debts, in ignorance of such agreement, is fraudulent and void.

The directors of a corporation are trustees of its stockholders, and in a certain sense, of its creditors, and any agreement to influence the action of such directors for the benefit of others, and to the prejudice of the company is void.

(Argued December 8, 1870; decided February 21, 1871.)

APPEAL from a judgment ordered by the General Term of the Supreme Court in the second judicial district, for the defendants upon a decision of the judge presiding at the Kings County Circuit, dismissing the complaint; the court having ordered the plaintiff's exceptions to be heard in the first instance at the General Term.

This action was brought upon an agreement bearing date September 10, 1856, whereby the defendants agreed, that in consideration that the plaintiff would aid and use his influence in procuring the mortgage bond holders of the Chicago, Alton and St. Louis Railroad Company, to fund the interest due and to fall due on their bonds, within three years from the second day of October then next, they, the defendants, would, in case they should get into possession of the road of said company under arrangements then in progress, procure the directors of that company or any new company to be formed under a proposed sale of the road, to agree by vote to pay certain interest coupons of the first and third mortgage bonds of said company, held by the plaintiff, then past due, and such as should thereafter fall due within a period specified, and that, if the defendants should continue in the control of the road themselves, or through directors of either company named by them, they would cause the company so controlling said road to pay said past due coupons, with interest, one half in one year the residue in two years, and

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the others as they should fall due. No question was made of the performance of the contract by the plaintiff. At the time of the execution of this contract, the property of the corporation was incumbered by three mortgages, amounting in the aggregate to four million and a half of dollars, and its franchises and property had been leased for twenty years. from August 31, 1865. The corporation was hopelessly insolvent and its franchises and property had been assigned to trustees, who then held the same upon trust for the payment of its debts and liabilities. The "arrangements then in progress," mentioned in the contract, consisted of negotiations and agreements between the defendants and other persons largely interested in the corporation, the main object of which was the formation of a new corporation, the board of directors of which should be composed of nine persons, five of whom should be in the interest of Matteson, and four of whom should be in the interest of Litchfield. The evidence showed that the new corporation was formed, and that the plaintiff was familiar with these arrangements during their progress and after the completion of them.

*J. L. Cadwallader*, for the appellant.

*John E. Burrill*, for respondent, Joel A. Matteson, cited as to the invalidity of the defendants' agreement, *Fremont v. Stone* (42 Barb., 169); *Davison v. Seymour* (1 Bosw., 90); *Mills v. Mills* (36 Barb., 474); *Bell v. Legget* (7 N. Y., 176); *Brown v. Brown* (34 Barb., 533); *Marshall v. Balt. R. R. Co.* (16 How., U. S., 314); *Gray v. Hook* (4 N. Y. R., 449); *Devlin v. Brady* (32 Barb., 518); *Satterlee v. Jones* (3 Duer., 116-117); *Tool Co. v. Morris* (2 Wallace, U. S., 45). That contract was void because securing a private advantage to the creditor inducing the other creditors to enter into it. (*Russell v. Roger* 10 Wend., 473; *Breck v. Cole*, 4 Sandf. S. C. R., 79; *Carroll v. Shields*, 4 E. D. Smith, 466; *Higgins v. The Mayor*, 10 How. Pr., 363; *Pinneo v. Higgins*, 12 Abb. Pr. R., 334; *Townsend v.*

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*Newell*, 22 How. Pr., 164.) That the court will not aid either party in enforcing such a contract. (*Nellis v. Clark*, 4 Hill 424; *Mozely v. Mozely*, 15 N. Y. R., 334; *Gray v. Hook*, 4 N. Y. R., 449.)

*Charles Tracy*, for the respondent Litchfield, citing substantially the same cases as the counsel for Matteson, and in addition, *Daughlish v. Tennent*, Eng. Law Rep., 2 Q. B., 49; 1 Redfield on Railways §§ 135, 140; *Colman v. Eastern Counties R. Co.* (4 Eng. R. Cas., 513); *Solomons v. Laing* (6 Eng. R. Cas., 301, 289); *Bridgport City Bk. v. Empire Stone Dressing Co.* (30 Barb., 421); 19 How. Pr., 51, etc.

GROVER, J. The plaintiff having been nonsuited upon the trial, upon the ground that the contract sued upon was illegal and void, and the judgment ordered in accordance with such nonsuit, that is the only question arising upon this appeal. The contract was to the effect that, in consideration that the plaintiff would aid and use his influence in procuring the mortgage bondholders of the Chicago, Alton and St. Louis Railroad Company to fund the interest due and to fall due on their bonds within three years from the 2d of October thereafter, the defendants undertook that in case they got possession of the road of the company under arrangements then in progress, they would procure the directors of the company or of any new company to be formed under a proposed sale of the road, to agree, by vote, to pay the past due coupons upon \$35,000 of third mortgage bonds and \$8,000 of coupons on the first mortgage bonds owned by the plaintiff, and that if the defendants continued in the control of the road themselves, or through directors of either company named by them, that they would cause the company so controlling the road to pay said past due coupons with interest, one half in one year and the residue in two years, and the others as they shall fall due; and, further, that if the plaintiff should take bonds for the above, the above shall be binding, if he surrendered the bonds as fast



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as the coupons were to be paid as specified. The proof showed that the railroad company was at the time hopelessly insolvent; that it had no means for the payment of the past due coupons of the mortgage bonds already matured or prospect of being able to pay those thereafter maturing; that it was the intention of the defendants to purchase the road, together with its stocks and franchises, at a sale to be made by assignees of the company in trust for its creditors, and that upon such purchase, a charter for a corporation should be obtained, to which new company the defendants should convey the road and property so purchased; that it was indispensable to the success of this scheme that the past due coupons of the mortgage bonds and those that should mature within the time specified should be funded on time in the bonds of the existing company or the one thereafter to be formed. The plain inference from the contract and the other facts is, that there was to be a composition by all the holders of the coupons in question by funding them as provided in the contract, and the fair presumption is that the other holders were to be induced to comply with the terms under a belief that the plaintiff was to be a party thereto in respect to the coupons held by him. This presumption does not rest simply upon the idea that the contracting parties must have known that no one would enter into the arrangement, knowing that the agent negotiating it had already stipulated for much better terms in respect to his own coupons, but is strongly fortified by the clause inserted at the close of the contract, to the effect that, if the plaintiff shall take bonds for his coupons, the defendants should, upon his surrendering them to them, pay him as fast as the coupons were to be paid by the contract. There can be no reason whatever given for the plaintiff's funding his coupons in bonds, the same as the others, when the payment with interest of those past due in one and two years was provided for by the contract, except to convince the other holders that he was compounding his own upon like terms; that he was endeavoring to persuade them that it was for the mutual interest of all concerned to do. Any agree-

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ment made by one creditor for some advantage to himself over other creditors who unite with him in a composition of their debts, is fraudulent and void. (*Brady v. Cole*, 4th Sand. Sup. Court, 79; *Russell v. Rogers*, 10 Wend., 473.) This is not the only infirmity of the contract. It was an undertaking by the defendants to control the action of the directors in such a way that the plaintiff should have a preference in the payment of his coupons over other holders, and in case the plaintiff had funded them on time in the bonds of the company, to cause the company to pay the amount of the bonds to the plaintiff before their maturity. Such payment might have embarrassed the company, and consequently been injurious to its creditors and stockholders. This provision, therefore, rendered the contract unlawful. The directors of corporations are trustees of the stockholders, and in a certain sense of its creditors. Any agreement to influence their action for the benefit of others and to the prejudice of the company is fraudulent and void. (1 Redfield on Railways, § 140.) In answer to this, it is insisted by the counsel for the plaintiff that the defendants were the only parties to be affected; that they were to purchase and run the road, and, in short, to own the entire stock of the corporation. This may be so, in case of the formation of a new company to the extent of the ownership of the road intermediate the time of its purchase and the formation of the new company; but after such formation the presumption is that the stocks would become distributed among other persons to a greater or less extent. The judgment appealed from must be affirmed with costs.

All concurring except FOLGER, J., who did not vote. Judgment affirmed.

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Statement of case.

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JEAN F. PEPIN, Respondent, v. AUGUSTUS LACHENMEYER and  
CATHARINE LACHENMEYER, Appellants.

It is not error for the court to exclude an offer of evidence which, with the evidence already given, would be insufficient to establish the fact which it is intended to prove. An offer of testimony is to be presumed to include all that the party proposes to offer in addition to what they have already shown upon the particular issue.

Supreme military control in a city is not incompatible with the existence and authority of courts of civil jurisdiction and procedure there.

A transcript of minutes extracted from the docket of a court, is not admissible in evidence under the act of Congress of 26th May, 1790.

The acts of a *de facto* judge cannot be attacked collaterally, by showing that he has taken no oath of office, or that he has taken an oath to support a power in insurrectionary hostility to the federal government.

The secession of the State of Louisiana, attempted or temporarily effected, did not affect the jurisdiction of the civil courts of the State between citizens of that State.

(Argued February 9; decided February 21, 1871.)

APPEAL from a judgment ordered by the General Term of the Supreme Court in the first judicial district for the plaintiff, upon the verdict of the jury at the New York circuit; the justice at the circuit having ordered that the exceptions of the defendant be heard in the first instance at the General Term.

This action was brought upon a judgment rendered in the sixth district court of New Orleans, in the State of Louisiana, on the 7th of February, 1863.

The complaint alleges the commencement of the action, the appearance of the defendant, the judgment of the court, and that no part of it had been paid; also, that the court was a court of general jurisdiction, created by the laws of the State of Louisiana. The answer denies the record of the judgment, also that the court was a court of general or any jurisdiction, and alleges that the State was, at the time mentioned in the complaint, in open, armed rebellion against the government of the United States, and claimed to be one of the Confederate States; that one Rufus K. Howell at the time claimed to be judge of said sixth district court under an

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Statement of case.

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election had and commission issued to him under the authority of the State of Louisiana after she became one of the Confederate States; that he took the oath of office as judge, and swore to support the Constitution of the Confederate States; that the Supreme Court of the State of Louisiana was virtually abolished by the rebellion. The answer also sets forth an executive order of the President of the United States, dated October 20, 1862, reciting the insurrection, etc., and appointing a provisional court and Charles A. Peabody its judge, with power to hear, try and determine all causes, civil and criminal, including such powers and jurisdiction as belonged to the district and circuit courts of the United States.

The answer also alleged the military occupation of the city by the federal government, and that civil authority had not been restored, and that the action should have been brought in the provisional court, and also contained a general denial.

A certified copy of the judgment in the sixth district court of the city of New Orleans, in favor of the plaintiff and against the defendant, was offered in evidence and received, under objection by the defendant. The certificate of the clerk that the same was a correct transcript of all the proceedings had, documents filed, and evidence adduced on the trial, was attached to the judgment; also a certificate of the judge, to the effect that the court was a court of record, that the signature of the clerk was genuine, and his attestation in due form of law; also, the certificate of the clerk, with the seal of the court attached, that the court was a court of record, and that the signature of the justice was genuine, etc.

The executive order before mentioned was put in evidence, and evidence was introduced showing that Charles A. Peabody entered upon the duties of judge, under the executive order, in December, 1862, and continued to exercise them till November, 1865. The court excluded evidence offered by the defendant to prove that, during the time Judge Peabody remained at New Orleans, the government of the city was

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Opinion of the Court, per FOLGER, J.

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strictly military, or under the military authority; and the defendants excepted.

The defendants' counsel offered in evidence an exemplified copy of the minutes of the sixth district court of New Orleans; which was objected to by plaintiff's counsel, and the objection sustained.

*A. A. Phillips* and *L. S. Chatfield*, for the appellants.

*J. N. Balestier*, for respondent.

FOLGER, J. This is an action upon a judgment of the Sixth District Court of New Orleans, in the State of Louisiana, rendered in favor of the plaintiff and against the defendants, on the 7th day of February, 1863.

At the trial, at the circuit, the plaintiff offered in evidence a certified copy of the record of the Louisiana court. The defendants objected to its introduction in evidence. But the objection was general, not specifying any particular wherein it was illegal or defective. And though the same objection is made as a point in this court, it is in the same general way. Such an objection is not of any force. But we have looked at the record and the certificates of authentication. It seems to be duly authenticated according to the law of congress in that regard.

The record was received in evidence, and it shows the existence of a court, with a judge, clerk and seal, and it is *prima facie* evidence of the acts of the court as set forth in it, and that it had jurisdiction of the persons and of the subject-matter. (*Mayhew v. Thatcher*, 6 Wheat., 129; *Wheeler v. Raymond*, 8 Cow., 311; *Thomas v. Robinson*, 3 Wend., 268.) This established the judgment in favor of the plaintiff against the defendants, and made out his cause of action against them in the court below, unless they could succeed in impeaching it.

To do this, they put in evidence an executive order of the president of the United States, dated 20th October, 1862,

which, declaring that the insurrection had temporarily subverted and swept away the civil institutions of the State of Louisiana, including the judiciary and judicial authorities of the Union, so that it had become necessary to hold the State in military occupation, and indispensably necessary that there should be some judicial tribunal existing there, capable of administering justice; did constitute a provisional court, which should be a court of record for the State of Louisiana, and did appoint a provisional judge to hold said court, with authority to hear, try and determine all causes, civil and criminal, and whose judgment should be final and conclusive. They showed that the person appointed judge of this court commenced the exercise of his judicial functions in December, 1862, and continued them until in July, 1865.

The defendants then offered to prove by a witness, that during the period that judge remained in New Orleans, the government of that city was strictly a military government, or that, at least, it was under military authority. The court excluded the testimony, and the defendants duly excepted. We think that the court committed no error in this ruling. As this was an offer of testimony, and not a question to a witness, it must be taken as all that the defendants proposed to offer and show, in addition to what they had shown, upon this issue. All that they had shown, was the issuing of this executive order, and the exercise of judicial functions under it. It is to be observed, that though the judicial power assumed to be conferred by it was general and comprehensive, it was not exclusive. And though the order declared that the civil institutions of the State had been swept away, it was not conclusive evidence of such fact. Nor would it, in connection with the fact offered to be proved, that the city was under military authority, be sufficient to overcome the evidence that those civil institutions were not swept away, but that a court was in active existence, issuing process against persons and property, and obtaining recognition from citizens and obedience from litigants, which was furnished by the record which had been placed before the

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Opinion of the Court, per FOLGER, J.

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court. This showed a court with a formal title, with a judge, clerk, seal, attorneys practicing in it, sheriff, and a regular and formal mode of procedure. And the certificates showed the same court continuing, in regular existence, until after active insurrection had ceased, and civil order had, ostensibly at least, been restored; and that upon its files and records brought down in regular succession, was found the record of the proceedings and judgment between these parties. This record showed that this judgment was the ten thousandth and over which this court had given. It was not a tribunal then lately set up.

If this was all which the defendants proposed to show upon that question, it was clearly insufficient to prove and establish what the defendants had alleged in their answer.

If the testimony had been admitted, it could not have disturbed these facts; and as it seemed to be all which the defendants proposed, the rejection of it was as well, as to admit it and declare it insufficient. That is to say, the bare fact that the city of New Orleans was under military authority was immaterial, upon an issue whether a civil court alleged to be in existence, and in the exercise of its functions there, was so or not. There was nothing so incompatible in the co-existence of the two things, as that one being the other could not be; so that merely proving the existence of military authority, did not tend to prove the non-existence of a court of civil jurisdiction and procedure. The supreme power might be military, and yet there co-exist a judicial power, acting between citizens in the adjudication of their private differences, whose records and judicial proceedings were entitled to faith and credit in other courts in the United States.

The defendant's counsel then offered in evidence an exemplified copy of the minutes of the 6th District Court of New Orleans, containing the commission from the Governor of Louisiana to Rufus K. Howell, as judge of the 6th District Court of New Orleans, bearing date 18th April, 1861, and the oath of office indorsed on the back of it, in which the judge swears to defend the constitution "of the Confederate

States," taken 29th April, 1861. Upon the plaintiff's objection, the court refused to admit the paper in evidence and the defendants excepted. It will be observed that the paper offered, was not a copy of the records of the court, but a copy from its minutes. In *Ferguson v. Harwood* (7 Cranch, 408), it is held that a transcript of minutes extracted from the docket of a court, is not admissible in evidence under the act of Congress, 26th May, 1790, although the certificates of authentication are in due form of law. But the certificates were not in due form. The certificate of the judge does not state, that that of the clerk "*is in due form of law.*" *Smith v. Blagge* (1 John. Cases, 238 ; 2d ed. and note b).

But further than this, the person who assumed to act was judge *de facto*, and his acts were valid as between third parties, had he taken no oath of office. Nor would the fact, if proven, that he took an oath to support a power in insurrectionary hostility to the federal government, of itself, render his acts in a judicial capacity invalid, as between third parties. Those acts cannot be impeached collaterally. His title to the office could be questioned only in a proceeding against him directly, or impeached in some proceeding for his own benefit. (*The People v. White*, 24 Wend., 520-525 ; *The People v. Cooke*, 8 N. Y., 67-89).

The stress of the appellant's argument is this : Louisiana was a State of the Union, but in flagrant rebellion against the federal government ; it had organized a State government in opposition to the national government, in which was included a judicial system ; the court of the 6th Judicial District of New Orleans was a confederate court, established by confederate authority, and hence a nullity as to the United States, for by that power, the Confederate States was not recognized as a separate nation ; if it was a court established by rebels in arms, not recognizing the authority of the United States, it was not a court known to our laws ; it could not be a court of foreign jurisdiction because no such foreign power was acknowledged. It was, therefore, no court.



## Opinion of the Court, per FOLGER, J.

But there is assumed here, what is not in the proofs, nor is it in the history of the times; and that is, that this 6th District Court was established by confederate authority, or by rebels in arms. It was a court of the State of Louisiana. Now the State of Louisiana, at the time of the commencement of the plaintiff's proceedings in that court, and up to the date of the rendition of the judgment, was either a State of the Union, and temporarily disturbed in her normal relations with the national government, by a great insurrection against it; or it was for that time a conquered country and subject to the will of the conqueror; that will to be exercised in accordance with the law of nations. It will not be claimed, we think, that the latter was the case. The general purpose of the war was the re-establishment of the national authority, and the ultimate restoration of States and citizens to their national relations, without any view of subjugation by conquest. *The Venice* (2 Wallace, 258).

The proclamation of the President of 16th August, 1861, issued in pursuance of the act of Congress of July 13th, 1861, excepted from its declaration of a state of insurrection, those parts of States, from time to time occupied and controlled by the forces of the United States engaged in the dispersion of the insurgents. Such was the city of New Orleans, during the period covered by the legal proceedings under consideration. And in the succeeding executive proclamation of March, 1863, the port of New Orleans, was by name excepted from the declaration of being in a state of insurrection. The military occupation of the city of New Orleans on which the appellants so much rely, has been held to have been complete as early as on the 6th of May, 1862. (*The Venice, supra.*) But the proclamation of the general commanding, issued on that day, announced that "civil causes *between party and party* will be referred to the ordinary tribunals." (Parton's Butler, 294.)

It would seem, then, that this military occupation was but the repression of the insurrection, that is, of violent opposi-

tion; and that this being done, the ordinary relations of citizen with citizen, the making of contracts, the enforcing of those made, were not to be interfered with by the military hand, but left to go on in their usual course, and seek the local and usual tribunals.

It has also been held, that the actual secession of the State of Louisiana, attempted or temporarily effected, did not affect the jurisdiction of the courts of the State. (*White v. Cannon*, 6 Wallace, 443).

Without entering further into a field, too extensive for our minute exploration, it is sufficient for us to say, that in our view, the 6th District Court of New Orleans was a court of the State of Louisiana; that the rebellion against the national government in which the people of that State were involved, did not annul that court, its power or jurisdiction, but that it continued on in the exercise of them; that its proceedings were valid; that it had jurisdiction of the parties to the judgment sued upon in this action, and the subject-matter of it; and that the judgment it rendered was valid and ought to be enforced in this action.

The judgment of the court below should be affirmed, with costs to the respondent.

All the judges concurring, judgment affirmed.

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MORTIMER E. McENTEE, Respondent, v. THE NEW JERSEY STEAMBOAT COMPANY, Appellant.

An absolute refusal by a carrier to deliver goods to a person entitled to receive them constitutes a conversion of them; but if the refusal be qualified, and the qualification attached to the refusal be reasonable, and made in good faith, it does not constitute a conversion.

Common carriers deliver property at their peril, and must take care that it is delivered to the right person, for if the delivery be to the wrong person, either by an innocent mistake or through fraud of others they will be responsible, and the wrongful delivery will be treated as a conversion. Accordingly, where the defendants received goods at Albany, to be delivered in New York, addressed to "McEntee, New York," and on their arrival

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the plaintiff demanded them and offered to pay the charges, but the defendant refused to deliver them, and defendants gave evidence tending to show that the refusal was coupled with an offer to deliver the goods, if the plaintiff would produce any paper showing ownership or authority to receive them.—*Held*, that it should have been submitted to the jury, whether the refusal was qualified; and if so, whether the qualification was reasonable and was the true reason for not delivering the goods.

(Argued February 9, 1871; decided February 21, 1871.)

APPEAL from the General Term of the Supreme Court in the second district.

The action was brought against the defendants for the conversion of chattels claimed by the plaintiff. The defendants, as common carriers between Albany and New York, received from Mr. Guyer, at Albany, and carried to New York, in 1868, several bundles of sash and blinds addressed to "McEntee," New York. After these arrived at New York, the plaintiff claimed them, and gave evidence tending to prove that he demanded the goods and tendered the charges, and that the agents of the defendants refused to deliver them.

The defendants gave evidence somewhat in conflict with the plaintiff's statement, and also gave evidence tending to show that other property of a like character had on former occasions been received by Mr. Guyer in New York, and that the goods were first inquired for as the goods of Guyer, and that the defendant supposed they might belong to him, and that they offered to deliver them to the cartman of the plaintiff and to the plaintiff upon the production of any paper showing ownership or authority to receive them, and that the defendants were at all times ready to deliver the goods to the plaintiff upon the production of any reasonable evidence identifying him as the consignee and owner. The judge ruled and decided that the only question for the jury was whether the freight money was tendered, and restricted the counsel in summing up to that question only, and charged the jury, 1st. That when the defendants receive goods, the consignor putting them on a steamboat to be carried to New York without consigning them to any particular individual, the steamboat com-

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pany was authorized to deliver them to any person who calls for them; and, 2d. That common carriers have no right to insist on any person proving ownership, for they are not restricted as to the delivery, and incur no liability whatever in that respect.

To these several rulings the defendants excepted. The counsel for the defendants also made several requests to the judge to charge, which were refused, and exceptions taken to the refusal.

A verdict was rendered at the Kings Circuit in favor of the plaintiff for the value of the property, upon which judgment was entered and affirmed on appeal by the Supreme Court, and from the latter judgment the defendants have appealed to this court.

*William P. Prentice*, for the appellant, insisted that there was no conversion. (*Esmay v. Fanning*, 9 Barb., 188; *Ransom v. Wetmore*, 39 Barb., 104; *Tolano v. National Steam Nav. Co.*, 4 Abb. N. S., 316. Refusal must be positive and absolute. (*Holbrook v. Wight*, 24 Wend., 176; *Jessop v. Miller*, 1 Keyes, 321; *Mount v. Derick*, 5 Hill, 455; *Dunlop v. Hunting*, 2 Den., 643; 2 Phil. Ev., 226; *Carroll v. Mix*, 51 Barb., 215.) That carrier is responsible for wrong delivery. (*Coggs v. Bernard*, 1 Raym., 665; Co. Litt., 89a and note 6; Eds. on Bailm., 450, 532; 2 Pars. Con., 181, 199; 2 Redf. Railw., § 46, pp. 46-49; Ang. Car., § 324; *Hawkins v. Hoffman*, 6 Hill, 588; *Powell v. Myers*, 26 Wend., 591; *Packard v. Getman*, 4 W., 615; *Willard v. Bridge*, 4 Barb., 361; *Dudley v. Hawley*, 40 B., 397; *Dean v. Vaccaro*, 2 Head., 485; *Dufour v. Mephar*, 31 Miss., 577; *Hempstead v. N. Y. C. R. R.*, 28 B., 485; *Mich. and C. R. v. Day*, 20 Ill., 375; *Roberts v. Riley*, 15 La. An., 103; *Bradley v. Waterhouse*, 3 Carr. and P., 318; *Burrell v. North*, 2 C. and K. 680.) Carrier is bound to make reasonable inquiry as to title. (*Rogers v. Weir*, 34 N. Y., 463, 471; *Holbrook v. Wight*, 24 W., 169; Esp., 177 and cases there cited; 2 Par. Con., 204, 205; *Ostrander v. Brown*, 15 Johns., 40; *Powell v. Myers*, 26 Wend., 591; *Mount v. Derick*, 5 Hill, 455; *Carroll v. Mix*,

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51 Barb., 215; *Solomon v. Davis*, 1 Esp. N. P. C., 83; *Tuttle v. Gladding*, 2 E. D. Smith, 157; *Wells v. Kelsey*, 15 Abb., 53; *Guillaume v. Hamburgh Co.*, 42, N. Y., 212; *Wilson v. Vt. R. R. Co.*, 42 Vt., 200.)

*J. L. Overfield* (*A. J. Parker* with him), of counsel for respondents, insisted that the facts constituted a conversion. (15 Abb., 53; 19 How., 309; 1 Wils., 328; 6 Wend., 603; 10 id., 349; 11 id., 80; 20 id., 267; 22 id., 285; 23 id., 462; 4 Den., 323; 5 id., 240; 10 John., 175; 31 N. Y., 490.)

ALLEN, J. The defendants were charged for the conversion of the goods upon evidence of a demand and a refusal to deliver them. If the demand was by the person entitled to receive them, and the refusal to deliver was absolute and unqualified, the conversion was sufficiently proved, for such refusal is ordinarily conclusive evidence of a conversion; but if the refusal was qualified, the question was whether the qualification was reasonable; and if reasonable and made in good faith, it was no evidence of a conversion. (*Alexander v. Southey*, 5 B. and Ald., 247; *Holbrook v. Wight*, 24 W. R., 169; *Rogers v. Weir*, 34 N. Y., 463; *Mount v. Derick*, 5 Hill, 455.) If, at the time of the demand, a reasonable excuse be made in good faith for the non-delivery, the goods being evidently kept with a view to deliver them to the true owner, there is no conversion.

This action is not upon the contract of the carriers, but for a tortious conversion of the property; but the rights and duties of the defendants as carriers are, nevertheless, involved.

The defendants were bailees of the property, under an obligation to deliver it to the rightful owner. They would have been liable had they delivered the goods to a wrong person. Common carriers deliver property at their peril, and must take care that it is delivered to the right person, for if the delivery be to the wrong person, either by an innocent mistake or through fraud of third persons, as upon a forged order, they will be responsible, and the wrongful delivery will be

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treated as a conversion. (*Hawkins v. Hoffman*, 6 Hill, 586; *Powell v. Myer*, 26 Wend. R., 290; *Devereux v. Barclay*, 2 B. and Ald., 702; *Guillaume v. Hamburgh and Am. Packet Co.*, 3 Hand; 42 N. Y., 212; *Duff v. Budd*, 3 Brod. and Bing., 177.) The duties of carriers may be varied by the differing circumstances of cases as they arise; but it is their duty in all cases to be diligent in their efforts to secure a delivery of the property to the person entitled, and they will be protected in refusing delivery until reasonable evidence is furnished them that the party claiming is the party entitled, so long as they act in good faith and solely with a view to a proper delivery. The circumstances of this case, the very defective address of the parcels, and the omission of the plaintiff to produce any evidence of title to the property or identifying him as the consignee, justified the defendants in exercising caution in the delivery, and it should have been submitted to the jury whether the refusal was qualified, as alleged by the defendants; and if so, whether the qualification was reasonable, and was the true reason for not delivering the goods. The judge also erred in his instructions to the jury as to the duty of the defendants, as common carriers, in the delivery of goods. They may not properly, or without incurring liability to the true owner, deliver goods to any person who calls for them, other than the rightful owner. The judgment must be reversed and a new trial granted, costs to abide event.

All the judges concurring, judgment reversed and new trial ordered.

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WILLIAM T. COLEMAN, Appellant, v. HENRY EYRE,  
Respondent.

A parol agreement by the defendant to take a share in the plaintiff's interest in a trading adventure, is valid and binding, although the only consideration passing from the defendant to the plaintiff for such share, or his right to take it, was the obligation to share in the losses. Upon such

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an agreement, the plaintiff may maintain an action against the defendant to recover contribution of the losses of the adventure.

The plaintiff's promise to account to the defendant for one-half of the profits, is supported by the obligation incurred by the defendant to share one-half of the losses, and hence it is a case of mutual promises, reciprocally binding.

The agreement was not within the clause of the statute of frauds, requiring agreements for the sale of goods to be in writing.

(Argued February 14th, decided February 21st, 1871.)

APPEAL from an order of the General Term of the Superior Court of the city of New York, reversing a judgment entered on the report of a referee in favor of the plaintiff, and granting a new trial.

The facts in the case sufficiently appear in the opinion of the court.

*W. M. Macfarland*, of counsel for appellants, that the consideration was sufficient. (Comyn's Digest, vol. 1, p. 199 B. 7; 2 Blackstone Com., 444; 2 Kent Com., 465; 1 Chitty Pleadings, 297; Chitty's Contracts, 41; Parsons' Contracts, vol. 1, p. 468; *Billings v. Vanderbeck*, 23 Barb., 552; *Quarles v. George*, 23 Pick., 401; *Cartwright v. Cook*, 3 B. & Adol., 701; *McNeil v. Reid*, 9 Bing., 68; 23 E. C. L., 265; Broom's Maxims, 73; *Briggs v. Tillotson*, 8 John., 304; *Downey v. Hinchman*, 25 Ind., 454; *Funk v. Hough*, 29 Ill., 145; *Savard v. Mitchell*, 1 Coldwell Tenn., 87; *Howe v. O'Malley*, 1 Murphy Law and Eq., N. Car., 287; *Aldrick v. Lyman*, 6 R. I., 102; *Rice v. Sims*, 8 Rich. Law, 419; *Whitehead v. Patton*, 4 Iredell, Law, 257; *Carleton v. Jackson*, 21 Verm., 481; *Livingston v. Rogers*, 1 Caines, 583; *Keep v. Goodrich*, 12 Johns., 400; *Tucker v. Wood*, 12 Johns., 90.) That parol evidence was admissible to prove the agreement. (3 Kent Com., 26; *McKay v. Rutherford*, 6 Moore P. C. C., 414; *Smith v. Tarlton*, 2 Barb. Ch., 336; *Bunnell v. Taintor*, 4 Conn., 568; *Hess v. Fox*, 10 Wend., 437.)

*John H. Reynolds*, of counsel for respondents. That no partnership existed. (*Chase v. Barrett*, 4 Paige, 148;

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*Holmes v. United Ins. Co.*, 2 Johns. Ca., 329; *Post v. Kimberly*, 9 Johns., 470; *Porter v. McClure*, 15 Wend., 187; *Smith v. Wright*, 5 Sandf., 113, affirmed 1 Abb., 243; *Pattison v. Blanchard*, 1 Seld., 186; *Putnam v. Wise*, 1 Hill, 234, 238; *Murray v. Bogert*, 14 John., 318, 322.) That this agreement was within the statute of frauds. (*Lewin v. Stewart*, 17 How., 5; *Brabin v. Hyde*, 32 N. Y., 519; *Shindler v. Houston*, 1 Comst., 261; *Ely v. Ormsby*, 12 Barb., 570; *Good v. Curtis*, 31 How., 4.) It was a mere *nudum pactum*. (*Chitty on Contracts*, 15; *Ingraham v. Gilbert*, 20 Barb., 151; 11 Ad. & Ellis, there cited; *Livingston v. Rogers*, Coleman & C. Cases, 331; *Burnet v. Bisco*, 4 Johns., 235; *Utica & Syracuse R. R. Co. v. Brinkerhoff*, 21 Wend., 139.)

RAPALLO, J. The plaintiff was interested to the extent of one-fourth in the profits or losses of a shipment of coffee undertaken by him jointly with other parties. After the adventure had been begun, and before the coffee had reached its port of destination, it was mutually agreed between the plaintiff and the defendant that the latter should have one-half interest in the plaintiff's one-fourth interest in the adventure. The speculation resulted in a loss, and this action was brought to recover one-half of the plaintiff's proportion of such loss. It is now claimed on the part of the defendant that no valid contract was made between him and the plaintiff; that inasmuch as the plaintiff had embarked in the speculation before and without reference to any arrangement with the defendant, and the defendant had not done or contributed anything to aid in the joint enterprise, there was no partnership, and no consideration for the undertaking of the plaintiff to give him one-half of the profits; that therefore the defendant could not have enforced payment of half the profits, if the adventure had been successful, and consequently no agreement on his part to contribute to the loss can be implied.

This argument assumes that the agreement was simply that the defendant should have one-half of the profits, which the plaintiff might make out of the adventure, in case it should



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prove successful. But such was not the agreement proved. The agreement was that the defendant should share with the plaintiff in the adventure, and it seems to have been clearly understood that he should participate in the result, whether it should prove a profit or a loss. That it might result in a loss was contemplated by the parties. There is evidence in the case that the possibility of that event was the subject of conversation between them at the time of making the contract; that the hope was then expressed that the plaintiff would not be compelled to call upon the defendant to contribute to a loss; and that afterward, when they did call upon him to contribute, he did not dispute his liability, but sought to reduce the amount by claiming a portion of the plaintiff's commissions.

The evidence fully justified a finding that, in consideration of the agreement by the plaintiffs to account to the defendant for half the profits in case of success, the defendant undertook to bear half the loss in the contrary event; and the intentment is, that the referee did so find. Indeed, such is a proper construction of the actual finding. It is a clear case of mutual promises; and the obligation of each party was a good consideration for that of the other. (*Briggs v. Tillotson*, 8 Johns., 304.)

The evidence was conflicting as to whether the defendant was to share in the commissions. The referee found in the plaintiffs' favor on that point, and the court below, at General Term, refused to interfere with that finding. We cannot disturb it.

The agreement was not within the statute of frauds. It was not an agreement for the sale of any personal property or chose in action, but an executory agreement, whereby one party undertook to bear one part of a possible loss, in consideration of a share of an expected profit.

The judgment of reversal and order granting a new trial should be reversed, and the judgment for the plaintiffs entered on the report of the referee should be affirmed, with costs.

All the judges concurring.

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Opinion of the Court, per GROVER, J.

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Order of General Term reversed, and judgment for the plaintiffs affirmed.

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FREEMAN KELLY, Respondent, v. WILLIAM T. FALCONER,  
Appellant.

The plaintiff holding a contract for the sale of certain lands, part of the purchase-price of which had been paid by him, transferred the contract to the defendant as security for any advances the latter might make to pay the balance due thereon; and the defendant having paid up the contract and taken a deed to himself, with the assent of the plaintiff contracted to sell a portion of the lands to G, receiving part payment. At the same time, he agreed with G to advance him money to cut logs on the lot, the defendant to be repaid by taking the logs at agreed prices.—*Held*, in an action to redeem, brought by the plaintiff, that the defendant was not entitled, upon such redemption, to charge the plaintiff with any moneys advanced to G under the lumbering contract, but must convey to the plaintiff, and assign the contract with G and the logs on the land to him, upon being paid his advances to buy the land, less the amount received from G.

(Submitted February 6th, and decided February 21st, 1871.)

APPEAL from a judgment of the General Term of the eighth judicial district, affirming the judgment entered in favor of the plaintiff upon the report of a referee. The facts in this case are fully stated in the opinion of the court.

*A. G. Rice*, for the appellant.

*Henderson & Wentworth*, for the respondent.

GROVER, J. The ground urged by the counsel for the appellant, for the reversal of the judgment, was the refusal of the referee to hold the plaintiff liable to the defendant for his advances to Goodrich as a condition of requiring the defendant to assign to the plaintiff his interest in the logs as owner of the legal title and as vendor of Goodrich of the lands upon which they were cut, and upon which they

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remained at the time of the trial. To determine this question reference must be had to the facts proved and found by the referee. From these it appeared that the plaintiff held a contract from the owners (the executors of Nicholas Devereaux) for the purchase of 160 acres of land for \$1,620, a part of the purchase-price of which (\$500) had been paid, leaving the remainder unpaid; that the plaintiff assigned this contract to the defendant as security for such sums as the defendant might pay of the unpaid purchase-money, and for whatever amount the plaintiff might otherwise become indebted to the defendant; that the defendant paid to the vendors the balance unpaid of the purchase-money, and took a deed of the land in his own name; that he thereafter, with the assent of the plaintiff, entered into a contract with one Goodrich for the sale to him of seventy-five acres of the land, upon which Goodrich paid the defendant \$500 of the purchase-price, and the residue was to be paid thereafter as specified by the contract. It was proved that Goodrich, upon making the contract, entered into the possession of the land, which was all timbered land, and proceeded to cut his logs and wood upon the land, removing more or less thereof from the premises, and selling the same, except the logs, to others, but selling the logs to the defendant, who made advances to him to enable him to conduct the business, under an agreement that he, the defendant, should buy the logs and be repaid his advances out of the purchase-price; that, at the time of the trial, there were about 800 logs upon the premises cut by Goodrich, and that he was indebted to the defendant several hundred dollars for his advances in carrying on the business. The referee decided that the plaintiff was entitled to redeem from the defendant upon payment of the money paid by him to acquire the title, with interest, over and above what he had received from Goodrich, and of all his other indebtedness; and that, upon such payment, as directed by the judgment, the defendant should convey the land to him, subject to the contract made with Goodrich, and should assign to him the contract made with Goodrich, and

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should assign to him all the defendant's interest in the logs remaining upon the premises contracted to Goodrich, which he acquired by the conveyance of the title to him, and as vendor of Goodrich. The plaintiff testified, in substance, that he had nothing to do with the defendant's advances to Goodrich; and the referee refused to find that he had made any agreement in respect thereto.

Upon the above facts, it is clear that the referee was correct in holding that the plaintiff was entitled to a conveyance of the property from the defendant, upon payment to him of all the money for which he had assigned his contract to him as security. This did not include advances made by the defendant to Goodrich. As against the plaintiff, he had no right to make such advances. Goodrich, without the consent of the owner of the land, had no right to cut or remove timber therefrom. The legal title to the timber, as well as of the land, remained in the vendor, until Goodrich completed his contract, and obtained title by conveyance. This title to the timber was, in equity, held as security by the vendor for the payment of the purchase-money by the purchaser. Upon such payment the purchaser becomes entitled to a conveyance of the land, and this gives him title to any timber that may have been severed from the soil and held by the vendor as security for the purchase-money. The plaintiff, by payment of what the defendant held the property to secure, was entitled to a transfer from the defendant of the entire property, including the title of the defendant to the logs cut upon the Goodrich lot, which, as vendor, he held as security for the unpaid purchase-money by Goodrich. He could not retain those logs for any indebtedness of Goodrich to him, unless such indebtedness was contracted pursuant to an agreement with the plaintiff that he might so retain them. The judgment must be affirmed, with costs.

All the judges concurring.

Judgment affirmed.

## Statement of case.

AMOS R. WILLETTS and JOHN A. TOAN, Respondents, v. THE  
SUN MUTUAL INSURANCE COMPANY, Appellant.

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A promise void, when made, for want of mutuality of obligation, becomes void and binding upon the performance by the promisee of that in consideration of which such promise was made.

Accordingly, where, by the terms of a policy of insurance, the loss was not covered, but the company promised the owner, that, if he would find the property damaged, have it inspected and sold at auction, they would pay the deficiency.—*Held*, that the performance of these conditions by the owner entitled him to recover the deficiency from the company.

A general exception to a refusal to charge what is improper, in part, is not good as to the correct part of the request. It is not the duty of the judge to separate the good from the bad.

(Argued February 17, and decided February 21st, 1871.)

**APPEAL** from a judgment of the General Term of the Supreme Court, in the first judicial district, directing judgment upon a verdict of a jury rendered at the New York circuit, and overruling exceptions of the defendant heard and argued by stipulation in the first instance at the General Term.

This action was brought on a policy of insurance, dated December 22, 1863, on 223 barrels of cider, shipped on board the schooner *Frances Satterlee*, for Washington, from New York, containing the following clauses: "Property on deck; warranted free from claim for damage by wet, exposure, breakage or leakage." "This company is not liable for leakage on molasses or other liquids unless occasioned by stranding or collision with another vessel."

After the cider was loaded on the schooner, she sprung a leak, and after a delay of ten or fifteen days it was forwarded on another vessel, the *Charles Dennis*.

The plaintiffs being at Washington, and hearing of the reshipment, one of them about the 20th or 21st of January came to New York, called on the defendant, and inquired where the cider was. The defendant's agent said it was at Washington. Mr. Toan, one of the plaintiff's, said it was not,

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and said he thought the vessel must be frozen up at the mouth of the Potomac; that as the vessel had sprung a leak, and his cider was probably lost, and that was one of the things insured against, he would abandon it.

The defendant's agent, on behalf of the company, told him to go and hunt up the cider, recover it and have it inspected and sold at auction, and do the best they could with it, and then come back to the company and they would pay them the deficiency. Upon this promise Mr. Toan returned to Washington. The cider was found to have been frozen, was inspected and sold at auction. The defendant refused to pay the deficiency, and this action was brought to recover it. On the trial, the jury gave a verdict for the plaintiff for the amount of the deficiency. The case was taken to the General Term on exception, when judgment was ordered on the verdict. Certain requests to charge made by the defendant and refused by the court are sufficiently stated in the opinion.

*Joseph H. Choate*, for the appellants. That one who, through mistake of law or fact, acknowledges himself under an obligation which the law does not impose, is not bound by such promise. (*Walker v. Gilbert*, 2 Robt., 221; 1 Parsons on Contracts, 363; *Cabot v. Hastings*, 3 Pick., 83.) As to the necessity of the company knowing exact facts, and having its attention called to them, 2 Arnould Ins., 1202-1206, § 416; *Dow v. Smith* (1 Cai. R., 32); *Fangier v. Hallett* (2 Johns. Ch., 233).

*Erastus Cooke*, for respondent. That there was sufficient consideration for the agreement sued on. (*Russel v. Cook*, 3 Hill, 504; *O'Keson v. Barclay*, 2 Penn, 531; *Langridge v. Dorville*, 5 Barn. & Ald., 117; *Seaman v. Seaman*, 12 Wend., 381; *Farmer's Bk. v. Blair*, 44 Barb., 641; *Wayne & Ont. Col. Inst. v. Smith*, 36 Barb., 576; 7 N. Y., 351, and cases cited.) That the defendant's request to charge the jury being improper in part, will not raise any question upon the parts which were proper. (*People v. Holmes*, 6

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Park Cr. R., 26: *Hart v. Rens. & Sa. R. R. Co.*, 8 N. Y., 37; *Caldwell v. Murphy*, 11 N. Y., 416; *Carpenter v. Stillwell*, 11 N. Y., 61; *Killeen v. N. Y. C. R. R. Co.*, 24 How. Pr., 183.)

FOLGER, J. It seems to be conceded on all sides that the plaintiffs could not maintain an action on the policy of insurance alone, and that their right to recover of the defendants rests upon the result of the subsequent negotiation between them and the defendants, taken as a new agreement, in addition to the contract contained in the policy.

By the verdict of the jury, it is found that those negotiations resulted in a promise by the defendants, that if the plaintiffs would go from New York city to Washington, find and take charge of the cider, and, after inspection, sell the same at auction to the best advantage, and, returning to New York city, would exhibit to the defendants the statement of the sales, the defendants would pay the deficiency to the plaintiffs. And that the plaintiffs did, thereupon, go forward and perform all that was required in this promise; but that the defendants declined to pay.

Such a promise, after performance by the promisee, is valid and binding, and is supported by a consideration therefor. Doubtless it lacks mutuality at its inception; there is then no consideration, and the obligation of it is suspended. But when performance of the condition is made there does then attach a consideration, which relates back to the making of the promise, and it becomes obligatory. (*Train v. Gold*, 5 Pick., 380.) The promise could not be enforced before performance of the condition on which it is made, for until then there is no consideration. But as soon as the act has been performed, by which a party has been injured unless the promise is kept, the promise becomes binding. (*Hilton v. Southwick*, 17 Maine, 303.) Though there be not mutual promises, yet if, before he calls for the fulfillment of the promise, the promisee do perform that, in consideration of his doing which

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the promise is made, there is a consideration for the agreement, and it can be enforced. (*L'Amoureux v. Gould*, 7 N. Y., 349.) If these authorities are sound, the promise of the defendants was binding upon them. We see no reason to question them.

It is not necessary, then, this being the consideration which was the most clearly presented by the case, and the one to which the attention of the jury was particularly called, to inquire if there were other considerations which would uphold the defendants' agreement.

Upon this agreement, the plaintiffs can uphold the judgment they have recovered, unless there was some error at the circuit which has so damnified the defendants as that they should have a new trial.

The learned judge who presided at the trial gave this question fairly to the jury, instructing them that, if they found that this was the agreement between these parties, and that the plaintiffs had performed it on their part, a verdict should be found for the plaintiffs, on the footing of a new agreement, in addition to the terms of the policy. There was no error here. It stated to the jury, in effect, the same legal proposition which we have recognized above.

It is claimed, however, that, if the promise of the defendants is held to be binding upon them, so far as the question of there being a consideration for it is concerned, yet that they are discharged from a performance of it, because they made it without a full knowledge and understanding of the facts that the goods were shipped on deck on the *Satterlee*, and again on the *Dennis*, and of the fact that the loss claimed was by freezing and leakage alone, which were risks excluded from the policy; and that their attention was not presented to these facts.

If this agreement is to be treated as being an adjustment, then the defendants may be relieved from the performance of it, on the ground of fraud or mistake, from facts not known. (*Dorr v. Smith*, 1 Caines, 32.) And so of any contract.



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But are the defendants in a position to raise this question in this court? They excepted to that part of the charge of the learned judge in which he told the jury, "It comes simply to this question, whether there was an agreement between the parties upon all the material facts known and understood? If you shall find, on the whole, evidence that there was an agreement entered into, \* \* \* with a full knowledge and understanding on their (the defendants') part, in all this matter, then the plaintiffs are entitled to recover." The defendants do not, nor can they, claim that this, of itself, was erroneous, but they say that, taken in connection with his refusal to charge as requested, it was incorrect. The request to charge, here alluded to, was, in substance, that the plaintiffs could not recover, unless the promise of the defendants was made with their attention presented upon these facts: that the plaintiffs' cargo was laden on deck; that the loss claimed was by the freezing and leaking of the cider so laden on deck; that the policy did not cover cargo laden on deck, and did not cover risk from freezing and leakage of cargo on deck; and with the understanding and meaning, notwithstanding, that they would and did assume a liability for such loss under such circumstances. The position is, that, by erroneously refusing to charge as requested, he omitted to draw the attention of the jury to the particular things which were the material facts, of which he had spoken to them. Without considering how much force there may be in this, it is disposed of by a well-established and salutary rule. This was a request embracing several propositions, distinct though related. If there was any one of them which the learned judge might correctly refuse, as a unit, to adopt, he was not in error in refusing to adopt the whole: for the reason that it contained that one. He was not to be compelled to separate them, picking out and charging the good, and rejecting and refusing to charge only the bad. (*Keller, Adm'x, v. N. Y. Central R. R. Co.*, 24 How. Pr. R. [in Ct. of App.], 172; *Carpenter v. Stilwell*, 11 N. Y., 61.) There was more than one proposition in this request which he could well refuse to charge.

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Opinion of the Court, per FOLGER, J.

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The policy did cover cargo on deck for certain purposes, and as against some risks, although the company was exempt from claim for damage to property on deck by wet, exposure, breakage or leakage. It was not shown that the property, while on the Dennis, was laden on deck. Nor that the damage to it was by freezing or leakage, it at the time being on deck. Indeed, there was evidence, that when it left the deck of the Satterlee, to be transferred to the Dennis, it was in apparent good order. The learned judge was right then, in declining to charge in the terms as requested, and in charging as he did. And charging as he did, he presented to the jury for their determination, whether the defendants made their promise upon a knowledge and understanding of all the material facts, and the jury have found that they did. It was a material fact that the cider left the port of New York in winter weather, that before it had reached Washington, its port of destination, so cold had it become that the Potomac had frozen over; that cider is susceptible to frost; that the freezing of it expands it, and that when confined in barrels the expansion causes leakage. All this was known to the vice-president of the company, or made known to him by the plaintiffs as existing facts, or was within his capacity of deduction. Moreover, the witness Mills, acting for the plaintiffs, had informed him of these things before. So that the jury might well find on the facts, or by inference from the facts, that the promise was made with understanding and knowledge of all that was material. Nor, to meet another point made by the appellants, does it appear that any fact in the knowledge of the plaintiffs, which was not also in the knowledge of the company, was not communicated to it. The plaintiffs did not show to the vice-president of the defendant the letter received by them from Mills. But every fact stated in it defendant knew; that the property had been reshipped, and that the weather had been severe. The surmises of the writer were not facts, and could have been made as well by one person of sense as by another. And, moreover, the writer of the letter had testified, that he imparted these same sur-

## Statement of case.

mises to the vice-president of the defendants before the agreement. But it is claimed that though the points made by the appellants counsel may not be sustainable under the exceptions to the charge, and to the refusals to charge, that they arise also on the motion to dismiss the plaintiff's complaint, which was made when they rested their case.

We do not see that there are any grounds stated in that motion upon which the court would have been warranted in taking the case from the jury. The position there taken and now relied upon by counsel is that it must appear that the defendants knew and had their attention upon the facts that the cargo was laden on deck, and was damaged solely by freezing and leaking, and so understanding undertook to pay the loss. Now it was properly a matter for the jury, on the state of the evidence at that time, to give the answer to this proposition, and it was far from being that clear case for the defendant upon the testimony that they did not have their attention upon these facts, which called upon the court to pass upon it as a question of law rather than one of fact.

The judgment of the court below should be affirmed with costs to the respondent.

All the judges concurring.

Judgment affirmed.

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FREDERICK S. BRITTON, Assignee of George Schenck, Respondent, v. CHARLES LORENZ, THOMAS CROFTS and FRANCIS HOFFBAUER, Appellants.

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| 45  | 51  |
| 110 | 441 |
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| 114 | 356 |
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| 154 | 528 |
| 45  | 51  |
| 166 | 421 |

A bill of sale, though absolute upon its face, may be shown by parol evidence to have been given in trust for creditors.

The provisions of chap. 348, of Laws of 1860, apply to instruments which, though absolute upon their face, are in fact made in trust for creditors, and such instruments, when not properly acknowledged, as by that act required, are void.

All communications made by a client to his counsel with a view to professional advice or assistance, are privileged, whether such advice relates to a suit pending or contemplated, or to any other matter proper for such

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Statement of case.

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advice or aid; but communications made in the presence of all the parties to the controversy are not privileged, and this exception includes a case where the communications were made by the plaintiff's assignor in trust for creditors, in the presence of the defendant, to the attorney employed to draw the papers between them.

(Argued February 17th; decided February 21st, 1871.)

APPEAL from a judgment of the General Term of the Court of Common Pleas, of the city of New York, affirming a judgment at the trial term for the plaintiff.

This case was tried by the court without a jury, and the following facts were found: That on and prior to the 3d day of April, 1865, George Schenck was engaged in business in the city of New York as a dealer in hosiery, woolen shirts, and goods of that general character. That on the day last aforesaid, Schenck was embarrassed in his financial matters, and unable to pay his debts or meet his obligations as they became due. That on that day the defendants herein were, and they still are copartners in trade, doing business in the city of New York, under the firm name and style of Lorenz, Crofts & Co.

That on the 3d day of April, 1865, with a full knowledge on his own part and on the part of the defendants of Schenck's pecuniary embarrassment and inability to meet his debts and obligations, Schenck made, executed and delivered to the defendants, under their firm name of Lorenz, Crofts & Co., a bill of sale of all his property, including a stock of goods and merchandise then in his store, No. 1 Park place, New York city, also his safe, store-fixtures, and all claims and demands he had against any person or persons whatever, and transferred to the defendants a lease of the premises aforesaid. That the value of the goods and other property which this bill of sale purported to embrace and transfer, was the sum of \$16,350, which is exclusive of \$1,021.59 debts due Schenck. That the value of the lease was \$10,000 in cash. That on the same day Schenck delivered to the defendants, in addition to the property transferred by the alleged bill of sale, a check for the sum of \$500, which

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Statement of case.

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sum was thereafter collected thereon by the defendants. That the consideration expressed on the face of the alleged bill of sale was \$10,000, but that such alleged consideration was nominal, and that there was no consideration whatever paid therefor, nor for the check. That the bill of sale was made and executed by Schenck, and check delivered and lease transferred to the defendants, in trust, to convert the goods and other property into money, and to collect the debts due Schenck, and out of the proceeds thereof first to pay the debts of Schenck which he owed for borrowed money, and second, to distribute the balance thereof *pro rata* among all the creditors of Schenck, and the defendants accepted this trust. That the bill of sale was not before the delivery thereof to the defendants, nor has it been at any time since, acknowledged in any manner before any officer or other person authorized to take the acknowledgment of deeds, nor was any certificate of such acknowledgment in any manner indorsed upon the assignment or bill of sale at any time. That under color of this assignment or bill of sale, the defendants herein took possession of the goods and other property covered thereby, and removed the same to their own store and have converted the same to their own use.

That the debts due Schenck, which the bill of sale purported to convey, amount to \$1,021.59; that the defendants have refused in any manner to carry out the trusts upon which the bill of sale was given; that on the 8th day of April, 1865, Schenck, then being insolvent and unable to meet his obligations as they matured, and being indebted to various persons or firms, made out and executed an assignment in writing of all his estate, both real and personal, including all the property covered by the bill of sale, in trust, to Frederick S. Britton, the plaintiff in this action, for the benefit of his creditors, and the same day duly acknowledged the same before a notary public in and for the city and county of New York, and that a certificate of the acknowledgment was thereupon duly indorsed upon the assignment, and the assignment was thereafter and on 8th day

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Opinion of the Court, per GROVER, J.

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of April delivered to Britton; that the plaintiff thereupon undertook to execute the trusts under such assignment, and took possession of so much assigned property as he could find.

That the plaintiff as such assignee, before the commencement of this action, demanded from the defendants the delivery of the property covered by the bill of sale aforesaid, and also all moneys collected thereon, from choses in action and all other sources covered by said bill of sale, and from the lease of the store aforesaid, and upon the check aforesaid; but they have refused to deliver the same, or any part thereof, to the plaintiff, and have converted the same to their own use.

Objections were taken by the defendants' counsel to the evidence of a Mr. Dickinson, who had acted as counsel in relation to the bill of sale when both parties to the action were present.

*Amasa J. Parker*, of counsel for appellant.

*Aaron J. Vanderpoel*, of counsel for respondents.

GROVER, J. The judge found that the bill of sale, etc., made by the plaintiff's assignor to the defendants, though absolute upon its face, was really made upon the trust that the defendants should convert the property into money, and from the proceeds pay all his debts for borrowed money in full, and to distribute the residue, *pro rata*, among all his other creditors. It was competent to show this trust by parol evidence. (*Day v. Roth*, 18 N. Y., 448; *Mulford v. Miller*, 1 Keyes, 31.) The bill of sale having been given upon these trusts, it comes within the provisions of chap. 348, Laws of 1860, 594. Section 1 of that act provides that every conveyance or assignment made by a debtor or debtors of his, etc., estates, real or personal, or both, in trust to an assignee or assignees for the creditors of such debtor or debtors, shall be in writing, and shall be duly acknowledged before an officer

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Opinion of the Court, per GROVER, J.

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authorized to take the acknowledgment of deeds, and the certificate of such acknowledgment shall be duly indorsed upon such conveyance or assignment upon the delivery thereof to the assignee or assignees therein named. Unless instruments of this character are executed in conformity with this section they are void. (*Hardmann v. Brown*, 39 N. Y., 196.) It was insisted by the counsel for the appellant that this section was only applicable to instruments which upon their face purported to have been made upon trust for the creditors of the party executing it. This is not the true construction of the section. All instruments made upon the trusts therein specified come within its language, and clearly within the intention of its framers. That intention was to prevent fraud by setting up fictitious transfers of property claimed to have been made for the benefit of creditors, and by such means prevents its application by the course of law to the payment of the debts of the owner. Such frauds may be practiced with equal success, where it is necessary to resort to intrinsic proof to show the trust for creditors, as when such trusts appear upon the face of the instrument. The bill of sale not having been executed, as required by section 1 (*supra*), was void, and no title was acquired by the defendants under it. It follows that such title remained in Schenck, the former owner, until his assignment to the plaintiffs and passed to them by virtue thereof.

It was assumed by the parties that the case was not triable by jury, and no request that it should be so tried was made by the defendants nor any ruling of the court thereon. That question cannot, therefore, be raised in this court.

An exception was taken to the finding by the judge that the value of the lease transferred to the defendants by Schenck was \$10,000 in cash. This finding was not unsupported by the evidence, and after affirmance of the judgment by the General Term is conclusive upon this court. The defendants also excepted to the finding of the fact by the judge, that the defendants had converted the property to their own use, and also to the legal conclusion deduced therefrom, that having so

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Opinion of the Court, per GROVER, J.

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converted it they were liable to the plaintiff for the value thereof. These exceptions are general and applicable to the whole property, including the check and lease, as well as the property embraced in the bill of sale. It is somewhat difficult to see what precise question was designed to be raised by these exceptions. The evidence warranted a finding of the conversion of the goods embraced in the bill of sale and of the check, and this being the property of the plaintiff, the legal conclusion that the defendants were liable to him for the value thereof was correct. The lease created an interest in real estate for a term of years unexpired at the time of the assignment thereof to the defendant by the debtor Schenck. This assignment was rightly adjudged to be void, and that the defendant acquired no title to the premises by virtue thereof. This title became invested in the plaintiff under the assignment to him. The appropriate relief in respect to these premises would have been to have required the defendants to surrender up the possession of the premises to the plaintiff, and to pay such damages as he had sustained by the wrongful withholding of the premises from him, if it was still in the power of the defendants to surrender such possession. But it does not appear that it was in their power to yield up possession. There was no request by the defendants for any finding upon these facts, nor any request made to the judge to apply any such rule in respect to the premises covered by the lease. For aught that appears, they had put it out of their power to restore possession to the plaintiff. If this was the fact, they were equitably liable for the injury thereby sustained; and the value of the leasehold interest, of which the plaintiff had been deprived by the wrongful act of the defendants, was the appropriate measure of damages for the injury. The exception taken fails to show that any legal error was committed in respect to the leasehold interest, to the prejudice of the defendants.

The remaining inquiry is, whether the judge erred in receiving the testimony of Dickinson as to what was said by Schenck and the defendants, at the time he drew the bill of sale. Dick-



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Opinion of the Court, per GROVER, J.

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inson was an attorney and counsellor, and was employed to draw the bill of sale. It is insisted by the counsel for the appellant that all that was said by either having any relation to the business or the object or purpose of the bill of sale, are to be regarded as confidential communications from clients to counsel, and, therefore, inadmissible as evidence, without the consent of both parties. The competency of attorneys and counsel to testify as to communications made to them, and matters that they have learned in the course of their professional employment, has been extensively discussed by the courts of the State, and the cases involving that question thoroughly examined. (*Whiting v. Burney*, 30 N. Y., 330; *Coventry v. Tannahill*, 1 Hill, 33; *The Bank of Utica v. Mersereau*, 3 Barbour Ch., 533.) The rule deducible from the authorities is, that all communications made by a client to his counsel, for the purposes of professional advice or assistance, are privileged, whether such advice relates to a suit pending, one contemplated, or to any other matter proper for such advice or aid; that, where the communications are made in the presence of all the parties to the controversy, they are not privileged, but the evidence is competent between such parties. (*Whitney v. Barney*, *supra*.) Applying this principle to this case, the testimony of Dickinson was competent. The plaintiff sues as trustee for Schenck and his creditors. The question must be regarded as arising between him and the defendants. The conversation was had when both were present. They cannot be regarded as confidential or privileged as to either of these parties.

The judgment appealed from must be affirmed, with costs.

All the judges concurring,

Judgment affirmed.

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Statement of case.

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| 158 | 820 |

LUTHER PARMELEE, Respondent, v. ORVILLE THOMPSON,  
Appellant.

A promise to extend the time of payment of a debt is void, unless founded upon a good consideration; and a payment of a part of the debt or the interest already accrued, or, an agreement to pay interest for the future, is not a sufficient consideration for such a promise; nor will the giving of a new obligation with additional security for a part of the debt be a good consideration for a promise to extend the time as to the residue.

ALLEN, J.

The discharge of a legal obligation by a debtor to his creditor is not a sufficient consideration for the promise of the latter.

Accordingly where a party, sued upon a note, paid the costs that had accrued in the suit, upon an agreement that it was to be discontinued and he was to have a month further time to pay the note.—*Held*, that the promise to extend the time was void for want of sufficient consideration.

(Submitted February 17th; decided February 21st, 1871.)

APPEAL from the judgment of the General Term, in the eight judicial district, affirming a judgment rendered at the Orleans County Circuit for the plaintiff.

The action was upon a promissory note made by the defendant and two others, payable to the order of one Tracy. After the maturity of the note, the plaintiff paid to the payee and holder the amount due thereon, and received from him the note, and on the trial testified that he paid the money on a purchase, and not in satisfaction of the note, and received the same as purchaser, and to collect for his own use. Evidence was given on the part of the defendant, tending to show that the money was paid in discharge of the note, and not upon a purchase of it. The question of fact was submitted to the jury, who rendered a verdict in favor of the plaintiff for one-half of the note, the jury in effect finding that the plaintiff paid and satisfied the note as to the moiety payable by the makers, other than the defendant, and acquired a good title, with right to enforce it as to the other moiety. The defendant gave evidence tending to show that while the payee held the note, an action was brought thereon in the Supreme Court,

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Opinion of the Court, per ALLEN, J.

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and that it was agreed between the defendant and the payee and plaintiff in the action, that the suit should be discontinued, and the defendant pay the costs that had then accrued thereon; that the defendant should have during the ensuing month of December to pay the note; and that the costs were paid and the suit discontinued, after which the plaintiff became the owner of the note, and brought this action before the expiration of the time agreed upon. The judge at the circuit held and decided that there was no valid agreement to extend the time of payment. Judgment was given for the plaintiff upon the verdict, which was affirmed upon appeal by the General Term, and the defendant has appealed to this court.

*Holmes & Thompson*, for appellant. That the payment operated as a satisfaction. (Edward's on Promissory Notes, 536; *Burr v. Smith*, 21 Barb., 262; *Sandford v. McLean*, 3 Paige, 117; *Smith v. Miller*, 25 N. Y., 619.)

*John H. White*, for respondent. That there was no consideration for the agreement to extend time of payment. (*Reynolds v. Ward*, 5 Wend., 50; *Gibson v. Renne*, 19 id., 389; *Tryon v. Jennings*, 22 How. Pr., 421; *Bank of Amsterdam v. Blair*, 44 Barb., 641.)

ALLEN J. It is competent for the parties, by a parol agreement, to enlarge the time of performance of a simple contract, and the time of payment of the note in suit might have been extended by such agreement made upon a sufficient consideration. (*Keating v. Price*, 1 Johns. Ca., 22; *Miller v. Holbrook*, 1 Wend. R., 317.) But a promise to extend the time of payment, unless founded on a good consideration, is void. A payment of a part of the debt, or the interest already accrued, or promise to pay interest for the future, is not a sufficient consideration to support such promise. (*Reynolds v. Ward*, 5 Wend. R., 502.)

Neither will the giving a new obligation with additional security for a part of the debt avail as a consideration for an

## Opinion of the Court, per ALLEN, J.

agreement to extend the time of payment of the residue. (*Gibson v. Renne*, 19 Wend. R., 389.) This court, in *Kellogg v. Olmsted* (25 N. Y., 189), decided that a promise by a debtor that he would not pay a debt then past due until a future day named, and that he would then pay the same with interest, was not a good consideration for the promise of the creditor to extend the time for payment. If the only consideration for the promise of the creditor is the performance by the debtor or a promise to perform some act which the latter is legally bound to perform, the promise is without consideration.

"The discharge of a legal obligation by the debtor to the creditor cannot be such an injury to the one or benefit to the other as will make what the law calls a sufficient consideration for an agreement." (Per BRONSON, J., *Gibson v. Renne*, *supra*.)

The payment of the costs of the former action upon the note was but the discharge by the defendant of a legal obligation. The right of the plaintiff to recover in the action was not disputed, and his right to the costs of the action were as absolute and certain as his right to the debt, to recover which the action was brought.

The defendant lost nothing and the holder of the note acquired nothing by the arrangement. There was then no valid agreement to extend the time for the payment of the note.

The questions of fact affecting the title of the plaintiff to the note were properly submitted to the jury, and this court cannot review the verdict. The judgment must be affirmed.

All the judges concurring except the Chief Judge, who did not sit, and GROVER, J., not voting.

Judgment affirmed.

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Statement of case.

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JESSE CARLL, Respondent, v. PAUL N. SPOFFORD, Appellant.

The defendant, owner of a vessel, entered into negotiations with the plaintiff to repair her. The plaintiff refused to limit the expenses to any fixed sum, but stated that, at a rough guess, he supposed the repairs would amount to \$6,000 or \$8,000. Afterward the defendant wrote to the plaintiff directing him to make certain specified repairs, to observe the strictest economy, and saying: "If you find on further examination that it (the expense) will be likely to exceed the sum you have named, of \$6,000 or \$8,000, you will at once advise me, as I do not care to go beyond that sum." The vessel was in worse condition than supposed, and the defendant was so informed. The plaintiff's bill amounted to \$12,236.49.—*Held*, that the completion of the repairs named in the letter was the primary and leading intent of the contract without any condition other than the observance of the strictest economy, and that the plaintiff could recover the amount of his bill.

Argued February 6th, and decided February 8th, 1871.)

APPEAL from a judgment of the General Term of the Supreme Court, of the second judicial district, affirming a judgment for the plaintiff entered upon the report of a referee.

This action was upon the *quantum meruit* for the balance of a shipwright's bill for repairs upon a brig belonging to the defendant.

The whole amount of the bill claimed was \$12,236.49, of which \$5,921.08 had been paid, leaving a balance of \$6,315.41 due. At the defendant's request the plaintiff examined the vessel and expressed the opinion that she was well worth repairing. He declined to do the work upon contract for a fixed sum, and said he could not make an estimate, but that, at a rough guess, he supposed the work would cost from \$6,000 to \$8,000. The defendant subsequently wrote him the letter given in the opinion of the court.

The referee held that the plaintiff was entitled to recover the whole amount of his bill, notwithstanding it exceeded the amount named in the letter.

*E. A. Doolittle*, for the appellant.

*Townsend Scudder*, for the respondent.

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Opinion of the Court, per CHURCH, Ch. J.

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CHURCH, Ch. J. The judgment was rendered for the balance claimed to be due the plaintiff, for work and materials done and furnished, in repairing and refitting the brig "Rush," belonging to defendant. It appeared that, after negotiations between the parties, in which the plaintiff had refused to limit the expense to a specified sum, and stated that he could not make an estimate, but that, at a rough guess, he supposed the repairs would be \$6,000 or \$8,000, the defendant wrote the following letter to the plaintiff, which, the referee finds, contained the essential conditions of the contract:

"NEW YORK, *April* 18, 1867.

"JESSE CARLL, Esq., Northport, L. I.:

"Dear Sir.—I have decided to let you repair the brig 'Rush,' by putting on a new bow, putting in the few pieces required to replace the decayed wood, putting on a rider keelson, a new deck, putting on a new rail, and putting in new bends.

"I wish the work done as cheaply as is consistent with safety and economy, and that not one dollar should be unnecessarily spent on her; and if you find, on further examination, that it will be likely to exceed the sum you have named, of \$6,000 or \$8,000, you will at once advise me, as I do not care to go beyond that sum. It is my understanding that, while you have thought it possible the expense might reach those figures, you are to use every effort to put the vessel in order at as low a price as possible; that you are only to charge a moderate profit for your work, and that no expense that can be judiciously avoided is to be incurred. I also write a line to Capt. Petty.

"Yours, truly,

"(Signed)

P. N. SPOFFORD."

On examining the vessel, she was found to be more unsound than was expected, of which fact the defendant was apprised; but it does not appear that anything was said about what amount of additional expense would be required, or whether it would cause the whole repairs to exceed the sum of \$8,000 or not.

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Opinion of the Court, per CHURCH, Ch. J.

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The referee also found that the work was skillfully and economically done, and the vessel delivered to the defendant according to the requirements of the contract, as to her condition and qualities; that the bills for repairs were not footed up until the whole work was completed, when it was ascertained that the whole expense was \$12,236.49, of which there remains unpaid \$6,315.41; and that the plaintiff acted in good faith.

It is claimed that, by the terms of the contract, contained in the letter, the plaintiff was bound, when the limit named, of \$8,000, was reached, to inform the defendant, and that this was a material condition in the contract for the defendant, to enable him then to determine whether he would go on or abandon the work; and that the referee erred in the conclusion of law that the putting on of the repairs named in the letter was the primary and leading intent of the contract, without any condition other than the observance of the strictest economy. This must be taken in connection with the finding, that it is not the proper construction of the contract that the work was to be abandoned after having been begun, on finding that the cost of repairs exceeded the estimate.

It is manifest that the expense was not limited by the contract, and that neither party so understood it. The most that can be said is, that the plaintiff agreed (regarding the letter as the contract) that if he should find, on further examination, that the expense would be likely to exceed the sum named, to inform the defendant. This examination was evidently to be made before the work commenced. A partial examination had been made, and the defendant desired the plaintiff to make a further examination, and report his opinion as to the probability of a larger expenditure being needed. Such examination was made, and the defendant informed of the result. It does not appear that the defendant asked the plaintiff his opinion of the expense, from the further examination, or whether it would exceed the specified limit, nor is there anything in the case tending to show that the plaintiff then supposed that the expense would be likely to exceed

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Statement of case.

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\$8,000. The construction claimed by the defendant, that when \$8,000 was expended the plaintiff was to stop and inform the defendant, cannot be sustained. The language does not warrant such a construction, and the circumstances attending the transaction, and the nature and character of the work to be done, repel it. It would require very clear expressions to establish a construction that the defendant intended under any circumstances to expend \$8,000, and leave the vessel in a condition unfit for use. If not impracticable, it would be quite inconvenient to adopt this mode of doing the work and furnishing the materials. Such a condition might be made, but in the absence of the clearest intention, it will not be presumed. The defendant wanted his vessel repaired, and he was anxious to limit the expense, but the plaintiff refused to undertake the work with a limit, or to make any fixed estimate. The defendant directed the work to be done, with an expression that the expense should not exceed \$8,000, and that the work should not go on if, in the plaintiff's opinion, on further examination, it would cost beyond that sum. It does not appear that the plaintiff entertained the opinion that it would, and the work proceeded as directed. The defendant was disappointed in the amount of the expense, as most people are who undertake extensive repairs, but in the absence of bad faith, or express contract, there is no principle of law which will justify holding the plaintiff responsible.

The judgment must be affirmed.

All the judges concurring, judgment affirmed.

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JAMES F. DARNALL, Respondent, v. HOMER A. MOREHOUSE  
and others, Appellants.

If commercial paper, when received upon the sale of property, by the vendor at the risk of the vendee as to its payment, or as a security upon a pre-existing debt, becomes valueless through the *laches* of the party

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## Statement of case.

receiving it, the loss must be borne by him and he cannot recover the price of his goods or his debt.

The plaintiff, on the 28th of October, while receiving from the defendant at B., in this State, drafts in payment for cattle sold to him, stated that he lived at G., in Indiana, that he wanted to go thither on the next train and that he had just about time to get to it; and the defendant thereupon requested the teller of the drawer of the drafts "to fix him (the plaintiff) out, as he wanted to go by the train"; and the plaintiff took the drafts with him to G., whence they were forwarded to New York, were not presented until the 4th of November, and payment was then refused.—*Held*, the defendant was discharged and it was error to submit to the jury the question, whether, by this conversation, the defendant had consented to the draft being taken to G., and thereby excused the plaintiff's *laches*.

Where the defendant testified that, after cattle had been sold and delivered to him by the plaintiff, he went with the plaintiff to a banker and there paid the purchase price to the bank teller, by whom the plaintiff being asked how he would have it, replied "in two drafts," specifying the amounts, which were made out and delivered to him after being indorsed at his request by the defendant; and the plaintiff did not testify that any thing was said between him and the defendant as to drafts, but that, after entering the bank, the defendant spoke to the teller, who immediately commenced to fill up a draft, and he, the plaintiff, told him to make two drafts, specifying amounts. The question as to whether or not the plaintiff elected to receive the drafts in payment for the cattle should have been left to the jury. GROVER, J.

(Argued February 15th; decided February 21st, 1871.)

APPEAL from a judgment entered upon the decision of the General Term of the Superior Court of Buffalo, on a case containing exceptions directed to be heard in the first instance at a General Term.

On the 28th of October, 1867, the defendant purchased of W. Johnson a herd of cattle, supposing Johnson to be the principal. He was, however, in fact, the agent of the plaintiff and others.

The sale of the cattle was for cash on delivery. The price was agreed upon and the cattle were weighed and delivered. About two hours after the delivery, the defendant Homer A. Morehouse, took Mr. Johnson, who sold the cattle as the agent of the plaintiff, to the banking office of Mr. Shuttleworth to pay the purchase price of the cattle. Nothing had been said

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prior to this relative to the manner of paying for the cattle. Mr. Johnson at the time of the sale of the plaintiff's cattle sold with them some cattle belonging to Messrs. Smith and Steele. Johnson testified, that when the parties went into the banking office, defendant instructed the teller to deliver to him, Johnson, a draft and Mr. Johnson told him he would have the amount in two drafts, one covering the amount going to the plaintiff, and the other for the amount going to the Messrs. Smith and Steele. When the drafts were delivered to Mr. Johnson he told the defendant he would have to indorse them, and he did so.

The defendant, Morehouse, testified, that he and Johnson went into to the office of Shuttleworth; figured up the amount (\$4,926.30), that Burke (Shuttleworth's teller), asked Johnson how he would have it; that Johnson said he would have it in drafts to order of W. Johnson, one for \$2,100, and the other for the balance; that Burke handed him the drafts on Fisk & Hatch, New York, for the amounts, and he, Johnson, said to Morehouse, "I want you to put your name on these, and that Morehouse did put his name on them; that, at the same time Morehouse gave to Burke a draft on his partner, the defendant J. S. Miller, for \$4,935.40, the price of the whole drove of cattle, with \$9.10 exchange, which draft was paid. It also appeared, at the time Johnson received these drafts of Shuttleworth, on the 28th of October, 1867, Shuttleworth was in good credit, and that his drafts were paid by Fisk & Hatch up to and including the 2d day of November following, and that on such 2d day of November, Shuttleworth's balance with Fisk and Hatch amounted to more than \$20,000; that there were two daily mails from Buffalo to New York, one leaving at 2.30, P. M., and the other at 6, P. M., the 2.30 reaching New York at 7, A. M., the next day, and 6, P. M., train, at 1, P. M., the next day. The drafts instead of being sent at once to New York were carried by Johnson to his residence, Greencastle, Indiana, and were not presented to Fisk & Hatch until the 4th of November, when payment was refused.

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Opinion of the Court, per GROVER, J.

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The defendant's counsel requested the judge to submit to the jury the question, whether the plaintiff had elected to receive the drafts in payment for the cattle. The court refused so to do and the defendant's counsel excepted.

The court instructed the jury that the only question was, whether the defendant consented that the plaintiff should take the draft with him to Greencastle. The evidence upon this point is fully stated in the opinion of the court. To this instruction the defendant's counsel excepted. The jury found that such consent had been given, and found a verdict in favor of the plaintiff. The court then ordered the exceptions to be heard at the General Term in the first instance, and judgment upon the verdict suspended in the meantime.

*Nelson Smith*, for the appellants, insisted that the plaintiff was guilty of laches, and could not recover without showing that the defendants have not been injured. (*Little v. Phoenix Bank*, 2 Hill, 425; 7 Hill, 359; *Bradford v. Fox*, 39 Barb., 203; *Schofield v. Bayard*, 3 id., 488; *Allen v. Suydam*, 30 Wend., 321.

*John Ganson*, for respondent, insisted that there was no evidence showing that the plaintiff had received drafts as payment. (*Turner v. The Bank of Fox Lake*, 3 Keyes, 425; *Vail v. Foster*, 4 Com., 312; *Burkhalter v. The Second National Bank*, 42 N. Y., 538; *Porter v. Talcott*, 1 Cow., 359, 383; *Johnson v. Weed*, 9 Johns., 310; *Monroe v. Hoff*, 5 Den., 360; *Cole v. Sackett*, 1 Hill, 516; *Waydell v. Suer*, 5 Hill, 448; *Elwood v. Diefendorf*, 5 Bar., 398.)

GROVER, J. The exception to the refusal of the court to nonsuit the plaintiff was well taken. One ground upon which this motion was made, was that the plaintiff was guilty of laches in presenting the draft. It is clear that his right of recovery was barred for that reason, unless such laches was excused by the agreement of the defendant Morehouse that the draft might be taken to Indiana and forwarded from thence for collection. The draft was drawn, indorsed by

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Morehouse, and delivered to the plaintiff, at Buffalo, on the 28th of October, upon Messrs. Fisk & Hatch, New York, payable at sight. It was admitted that there were, at the time, two daily mails between Buffalo and New York, departing from Buffalo at different hours, so that, had the draft been forwarded by the earlier mail leaving Buffalo on the 29th of October, it would have arrived in New York in season for presentation on the 30th, and if by the latter, it would so have arrived in time for presentation on the 31st. The draft was not presented for payment until November 4, at which time the drawees had stopped paying the drafts of the drawer, having paid all that were presented to the close of business on the 2d of November, at which time they had a large amount of the funds of the drawer in their hands, having paid a large amount of the drafts of the drawer after the receipt of the draft in question by the plaintiff at Buffalo and the close of business on the 2d of November. The proof shows that the draft in question, instead of being forwarded for presentation from Buffalo with due diligence, was taken by the plaintiff's agent to Indiana, and from thence sent to New York. If the plaintiff did this pursuant to an agreement with the defendant Morehouse, the latter could not impute to him laches in consequence thereof, although prior parties who had not so agreed might have been thereby discharged. The question, therefore, is, whether there was sufficient evidence of any such agreement or consent by Morehouse as to warrant the submission of that question to the jury. All the evidence tending to show any such agreement or consent by Morehouse was the testimony of the plaintiff's agent, who transacted the business for him, and who was believed by Morehouse to be the principal therein, that he told Morehouse that he lived in Greencastle, in the State of Indiana, and that he wanted to get out on the next Lake Shore train, and that he had just about time to get to it, and that Morehouse told Burke, the teller of the drawee, who filled up the draft, to fix him out, as he wanted to go to the train. This testimony, taken to be true, as it must be for the

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purposes of the motion, fails to show that Morehouse knew he was going to take the draft to Indiana; much less his consent that he might so take it at his risk of the money being lost by the delay thereby occasioned. Not one word is said by the agent to Morehouse of any design so to take it, or of what he was going to do with it, or by Morehouse to him as to what he might or should do with it. The most that can fairly be inferred from the testimony is that Morehouse thought that the agent might take the draft to Indiana. If he so thought, or even knew that he intended to take it there, and that if he did so without his consent he would be thereby discharged, it would not excuse the laches in presenting the draft. Morehouse owed no duty to give information to the agent of what it was necessary for him to do to preserve his liability as indorser upon the draft or that of the drawer. Consequently his failing to inform him of what it was necessary for him to do, to charge him or the other parties, was not fraudulent, and he incurred no liability thereby. There was not a particle of evidence that the agent was induced to take the draft to Indiana, by anything said or done by Morehouse. By his so doing, the presentation of the draft was delayed for four or five days beyond the time when it would have been presented in the exercise of legal diligence, by reason of which the money was lost. That when commercial paper received by the vendor upon the sale of property at the risk of the purchaser as to its payment, or as security upon a pre-existing debt, is lost through the laches of the party receiving it, the loss must be borne by him, is a proposition well settled. This disposes of the case.

But as another question raised by an exception taken upon trial and discussed by counsel upon the argument may arise upon a retrial, it may be well briefly to consider it. That is, whether the judge ought not to have submitted to the jury the question whether the defendant, Morehouse, did not provide Shuttleworth, the banker, with funds, with which he (Shuttleworth) undertook to pay the plaintiff's agent for the cattle for him, and whether Shuttleworth did not pay the amount to the

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agent in such funds as the agent elected to receive, and whether the draft of Shuttleworth was not received by the agent of plaintiff, because he preferred that to currency, with instructions that, if they found such to have been the transaction, the draft operated as payment for the cattle, and precluded a recovery of the price by the plaintiff. There was but little conflict in the testimony. The cattle were sold by weight, to be paid for upon delivery. Nothing appears to have been said as to any particular medium of payment. The price was, therefore, payable in cash. Possession, before payment, was delivered to Morehouse, to enable him to take them to the Erie stock pens for shipment; after doing which, he promised to return and pay for the cattle. Morehouse returned, and the parties went into Shuttleworth's banking house, where they figured up the amount of the cattle, and, as Morehouse testifies, Burke, Shuttleworth's teller, asked Johnson, plaintiff's agent, how he would have it, who replied he would have it in two drafts, specifying the amount of one, and the balance in the other, payable to his own order, which was thereupon drawn and delivered to him; and that he then asked him to indorse them, and he put his name on them. Morehouse further testifies that he had frequently paid parties of whom he purchased cattle through Shuttleworth's bank, and that such parties had their choice between drafts and currency. This evidence, taken in connection with the known course of business by bankers, in making payments for parties furnishing them with funds for that purpose, tends strongly to show that Johnson received the drafts in payment for the cattle, and that he required the indorsement of Morehouse merely as surety for the drawer, which, as such, he was content to give. Johnson does not testify that anything was said between him and Morehouse about his taking a draft, or as to how he was to be paid; that after they had figured up the amount of the cattle, Morehouse stepped up to the teller and said something to him; that thereupon the teller commenced filling up a draft for the whole amount, and that he then told him he would have it in two drafts, telling him how they

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should be drawn; and that they were drawn and handed to him or Morehouse, and he asked Morehouse to indorse them, which he did. This presented a question, from all the evidence, whether Johnson received the draft from Shuttleworth in payment for the cattle sold Morehouse, in the usual way of payment by bankers of the checks of their depositors, or whether Morehouse purchased the drafts of Shuttleworth and gave them to Johnson for the price of the cattle. If the former, it was a payment for the cattle; if the latter, it was not, as the indorsement of the drafts by Morehouse showed that they were not received by Johnson as satisfaction, unless they were actually paid. (*Monroe v. Staff*, 5 Denio, 360.)

The judgment appealed from must be reversed, and a new trial ordered, costs to abide event.

All the judges concurring, judgment reversed and new trial ordered.

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ANDREW C. ELLIOTT, Appellant, v. ROSS W. WOOD and others, Respondents.

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The right of parties to agree upon the terms of a power of sale of mortgaged premises given to the mortgagee is clear, and courts have never assumed to control this right in the absence of fraud or some statutory regulation upon the subject. Parties may, in such cases, contract for private sale, and even without notice. ALLEN, J.

The statutes of this State regulating the foreclosure of mortgages by advertisement do not apply to mortgages upon real estate situated out of the State.

Where the plaintiff and others, claiming to own a guano island in the Carribean sea, contracted to sell to the defendants one-half of their interest in the island for \$30,000, the defendants to furnish \$20,000 more as a working capital, and to have the sole control and management of the business of mining and selling the guano; and afterward the plaintiff, being indebted to the defendants, gave a mortgage of his interest in the island to them, which contained a power of sale, and by its terms permitted them to purchase at such sale, and this mortgage was subsequently foreclosed, in the manner provided therein, but not in accordance with our statutes, the defendants bidding in the property,—*Held*,

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that the sale was valid, and that the plaintiff was thereby barred of all interest in the premises.

(Argued February 7, 1871; decided February 28th, 1871.)

APPEAL from an order of the General Term of the Supreme Court, in the first judicial district, reversing a judgment of the Special Term for the plaintiff, and granting new trial.

In June, 1857, the plaintiff, with others, claimed to own and to have taken possession of "Sombrero," an island in the Caribbean sea, containing deposits of guano, and contracted to sell to Wood & Grant, to whose rights and liabilities the defendants, Woods, have succeeded, one-half of the interest in the whole island, Wood & Grant agreeing to pay \$30,000 therefor, and advance for a working capital the further sum of \$20,000, so much of which as might not be required, to be divided among the owners *pro rata*. The agreement contained a provision that Wood & Grant should have the sole control of the working and management of the whole, for the mutual benefit of themselves and the other owners, and that the net proceeds should be divided in the manner particularly specified. The right to sell, lease and convert into a joint stock company, or to work for mutual benefit, was vested solely in Wood & Grant.

In August of the same year a formal conveyance of the moiety of the island to Wood & Grant was executed. In November, 1860, the plaintiff, then owning an interest of one-fourth in the island, executed a conveyance to Wood & Son of that interest subject to a defeasance (executed simultaneously by the grantees), by way of mortgage, to secure the payment of all claims and demands of the mortgagees then existing, for moneys advanced by them to or for the account of the plaintiff, which then amounted to about \$20,000, in which sum the plaintiff was, as stated in the defeasance, then justly indebted, and also as a further security for any future indebtedness of the plaintiff. The proceedings for a foreclosure and sale of the mortgaged interest, were prescribed by the defeasance, and subsequently modified by an agree-



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ment of the parties, and it was stipulated and agreed that the mortgagees, or their legal representatives or assignees, might become the purchasers of the interest at the sale under the mortgage, and that, in that event, no further or other conveyance of said property should be necessary; and such sale, whoever should become the purchaser, should be a perpetual bar, both in law and equity, against the plaintiff, his executors, administrators and assigns. The conveyance and mortgage were subject to all the rights of the defendant, Van Vechten, under a conveyance by way of mortgage, under certain agreements of October, 1858, and February, 1859.

About the 1st of May, 1861, the defendants, Wood & Son, rendered to the plaintiff an account of their management of the enterprise, showing a balance due them of \$51,217.48, for one-fourth of which they claimed to hold the plaintiff as their debtor; and about the 1st of April, 1861, they rendered the plaintiff an account against him individually, of \$34,598.94, payment of which balance was demanded. Payment not being made, the defendants, Wood & Son, gave notice to the plaintiff, and gave the other notices of foreclosure and sale prescribed by the agreement of the parties, and on the 16th day of August, 1861, offered the mortgaged property and interest for sale, pursuant to the mortgage, at the Merchants' Exchange in the city of New York, and the same was struck down to the mortgagees for twenty-five dollars, they being the highest bidders therefor.

They also bought the same property at a sale under the Van Vechten mortgage, in October, 1861, for \$1,200. The judge finds that the mortgage of Van Vechten was given to secure a usurious debt.

The judge, at the trial, held and decided that the sale under the mortgage to the defendants, Wood, and purchased by them, was void, and that the mortgage to Van Vechten was void for usury, and that no title passed to the defendants, Wood, as purchasers under the same; and that the sale and purchase under the same was also ineffectual and void, by reason of the trust relations of the defendants, Wood, to the

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plaintiff. It was adjudged at Special Term that the plaintiff was still the owner of the one-fourth of the island, and entitled to share in the earnings and products of the enterprise, and to an accounting from the defendants, Wood, down to the time of hearing, and a reference was ordered to state the account. The General Term, on motion, and on a case and exceptions, reversed the decision of the Special Term and ordered a new trial, and from the last order the plaintiff has appealed to this court.

*D. W. Adams* and *James Clark*, for the appellant, insisted that the plaintiff's title was not divested by sale under the Wood mortgage, first because they were trustees and agents of plaintiff and could not become purchasers. (1 Will. Eq. Jur., 186-190; 1 Story Eq. Jur., §§ 322, 323; 2 Sugden on Vend. and Pur., 190; *White's Lead. Eq. Cases*, 72, and notes; *Davoue v. Fanning*, 2 J. Ch., 252; *Michaud v. Girod*, 4 How. U. S., 554; *Holt v. Holt*, 1 Chan. Cas., 190; *Whelpdale v. Cockson*, 1 Ves., 9; *Fox v. Mackreth*, 2 Bro., 400; *Ex-parte Reynolds*, 5 Ves., 707; *Ex-parte Bennett*, 10 Ves., 385; *Coles v. Trecothick*, 9 Ves., 246; *Stuart v. Kissam*, 2 Barb., 493; *Quackenbush v. Leonard*, 9 Paige, 334; *Slade v. Van Vechten*, 11 Paige, 21; *Mills v. Goodsell*, 5 Conn., 475; *Cnmb. Coal and Iron Co. v. Sherman*, 30 Barb., 553; *Robinson v. Smith*, 3 Paige, 222; *Butts v. Wood*, 37 N. Y., 317.) That being mortgagees, they could not without statutory authority become purchasers. (1 Wash. on Real Prop., 528, 529; *Jennison v. Hapgood*, 7 Pick., 1; *Daves v. Grazebrook*, 3 Meriv., 200; *Benham v. Rowe*, 2 Cal., 387; *Hyndman v. Hyndman*, 19 Verm., 9; *Waters v. Groom*, 11 Clark & F., 684; 1 Lead. Cas. in Eq., 211, note; *Hoyt v. Martense*, 2 Smith, 231; *Shee v. Manhattan Co.*, 1 Paige, 48; *Dobson v. Barry*, 4 Seld., 216; 2 Story Eq., § 1019; *Crabb's Law of Real Prop.*, § 2262; 4 Kent's Comm., 158; *Coote on Mort.*, 11; *Henry v. Davis*, 7 Johns. Ch., 40; *Lawrence v. Farmers' Loan and Trust Co.*, 3 Ker., 200; *Pease v. Benson*, 28 Maine, 336.)

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*Stephen P. Nash*, for the respondent, insisted that the sale under the Wood mortgage was valid. (*Olcott v. The Tioga R. R. Co.*, 40 Barb., 179; 27 N. Y., 546; *Frost v. Koon*, 30 N. Y. R., 428; *Lindley on Partp.*, 761.)

ALLEN, J. Wood & Grant, to whose rights, duties and obligations the defendants, Wood & Son, have succeeded, paying \$30,000 in cash for their interest, furnishing the working capital for the development of the enterprise, and mining, collecting and sending to market the products of the island, and coming under positive engagement to advance \$20,000 for that purpose, were properly accorded the sole control of the working management of the island as a reasonable security for the repayment of their advances. They had also the power to transfer or lease the property to a joint stock company, or work the same for the mutual benefit of the persons in interest. They did not lease or sell, but worked the same, retaining the control and management under the agreement. This agency or trust, by whatever name it is called, imposed a duty upon the agents to exercise the utmost good faith toward every other party in interest.

In the conduct and management of the business, they occupied a confidential relation to their associates in the enterprise, and were under obligations to labor for the benefit of all, and could not avail themselves of their position to secure any special or exclusive benefit or advantage to themselves.

In the management of the agency or trust, Wood & Son would not be permitted to do anything inconsistent with the interests of the business, or which would interfere with their duty, and in dealing with the others, whether they are regarded as principals, or as the beneficiaries of a trust, they would be held to the most entire good faith.

These principles are elementary, and apply to all persons standing in a confidential relation to others, as trustee, agent, partner, or otherwise.

There is no complaint, in this action, of malfeasance by Wood & Son, in the management of the business committed to their care, or in any of the expenditures connected with the enterprise, or the profits resulting from it.

This action was not brought in respect to such management, or for an accounting in respect to it, except as such account may result from the establishment of the plaintiff's claim as owner of the property, notwithstanding the mortgage sale.

The several parties in interest retained their property in the island in severalty, and each was competent to deal with the other in respect to it. Wood & Son were competent to contract for the purchase or sale of interests therein, with the plaintiffs or either of the other associates. They were in no sense the trustees or agents of the plaintiff in regard to his separate property rights, nor had they any power over the same, except as they might put the whole property into a joint stock company. But if a more intimate and enlarged trust relation existed between the parties, that relation might have been laid aside and a new contract made with the beneficiary, provided no undue advantage had been taken of the position. (*Ex parte Lacey*, 6 Vesey, 626; *Coles v. Trecothick*, 9 Vesey, 234.)

The conveyance by Elliott to Wood & Son, by way of mortgage, is not impeached by the evidence, or by the judgment. On the contrary, the same is established as a valid security.

Wood & Son offered to prove upon the trial the existence of the indebtedness, and the amount, and the correctness of the accounts rendered, showing nearly \$60,000 due from the plaintiff at the time of the foreclosure of the mortgage. This was excluded upon the objection of the plaintiff.

The evidence of the plaintiff shows very clearly that, at all times, he had full knowledge of the business and its results, being for a part of the time a superintendent of the works at the island, and making most of the sales of the guano. The title of Wood & Son under their mortgage was

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adjudged invalid, upon the sole ground that, being mortgagees, they could not become purchasers at their own sale. Personal notice of the time and place of the sale was given to the plaintiff; the other notices required by the terms of the power of sale were also published and given, and the plaintiff, by his counsel, attended and objected to the sale. It is not objected that the sale was not in all respects fairly conducted, or that the property did not bring its full value.

It is not sought to avoid the sale for irregularity, unfairness, inadequacy of price, or because the conditions of the power were not complied with.

It is not denied that the parties were competent to contract, the one to give and the other to take, the mortgage, and the consideration of the mortgage is not disputed.

The power of sale was a part of the security, and its terms, so far as consistent with law, were matters of conventional arrangement between the parties.

The mortgage was not of real property within the State, and therefore the power of sale, and proceedings under it, were not regulated by the statutes of this State regulating the foreclosure of mortgages by advertisement. (2 R. S., 545.) That statute relates solely to mortgages of property within the State.

The mode of transmitting or transferring title to real property in the Caribbean sea, is not within the scope of the legislation of New York, neither can the courts of this State, except as they may exercise jurisdiction over persons, by any judgment or decree, affect the title to property without the limits of the State. *Lawrence v. The Farmers' Loan and Trust Company* (3 Kern, 200), decided that the statute directed the manner in which property should be sold under a power of sale contained in a mortgage, and must be followed, but the sale was of lands within the State, under a power recorded as required in the county within which the lands were situated, and under a mortgage which permitted a full compliance with the statute.

It was not intimated that, but for the statute, the parties might not have made their own contract; on the contrary, it is expressly said that the power of sale is the proper subject of stipulation, and notice of the sale may be waived by agreement of the parties. (Per GARDINER, Ch. J., citing Coote on Mortgage, 124-128.) There was in the case before us a propriety, if not a necessity for stipulating the means and process for a foreclosure of the equity of redemption. The property mortgaged was out of the jurisdiction of the courts of the State, if not out of the jurisdiction of all civil courts, and the mortgagor might not be within the jurisdiction of any court of competent jurisdiction, when default should be made in the payment of the mortgage debt. The right of parties to regulate the terms of a power of sale of mortgaged premises by the mortgagee by stipulation, is clearly recognized, and courts have never assumed to control this right, or to make new contracts for the parties, in the absence of fraud or some statutory regulation upon the subject. Parties may contract for a private sale and without notice. (*Lawrence v. Farmers' L. and T. Co.*, *supra*; *Davy v. Durant*, 1 De Gex and Jones, Chan., 535; *Montague v. Dawes*, 12 Allen, 397).

In *Davy v. Durant*, the mortgagee, under a power to sell either by public auction or private sale, sold by private contract and agreed that a part of the purchase money might remain on mortgage, and it was held a good execution of the power; and in *Montague v. Dawes*, a purchase by the assignee of the mortgage, was held regular because "the power of sale in express terms authorized the mortgagee or his assigns, to become the purchaser at the auction sale under it." In *Downes v. Grazebrook* (3 Mer., 200), Lord ELDON clearly intimates that with the express authority of a *cestui qui* trust, a trustee may become the purchaser of the trust property.

But a mortgagee is not solely a trustee for the mortgagor, he is a creditor having interests to protect and has rights which a naked trustee may not have. *Waters v. Grower* (11 Cl. & Fin., 684). If it be conceded that a mortgagee with

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power of sale, being a trustee for sale, cannot either directly or indirectly, except by the express authority of the mortgagor, purchase the mortgaged estate, still he may do so, when such authority is conferred either by the terms of the power or in any other way.

In this State to avoid all question, express authority is given by statute to mortgagees, to become the purchasers at sales made by themselves or by their direction under a power of sale on the mortgage, although the power itself may not confer this authority; and in judicial sales under decrees and judgments of the courts the creditor plaintiffs, for whose benefit the sales are made, are permitted to purchase. Acts authorized by statute and permitted by judicial decrees, cannot be regarded as inconsistent with the obligations and rights of the parties interested, or as intrinsically wrong or impolitic, but must be deemed *prima facie* fair and honest.

Parties may stipulate in cases without the operation, but within the principle of the statute, for that which the statute expressly allows. In the absence of statute authority or the express assent of the mortgage debtor, bids in behalf of the creditor by the auctioneer making the sale, have been sustained in the absence of any evidence of unfairness.

In *Richard v. Holmes* (18 How. U. S. R., 143), Judge CURTIS says, "We have no doubt the creditor, for the satisfaction of whose debt the sale was made, had a right to compete fairly at the sale; but whether he had or not, his doing so could not be injurious to the complainants."

We are not called upon to go to this extent in the present case, but the decision is referred to as indicating the tendency of judicial decisions.

Powers of sale are construed liberally for the purpose of effecting the general object, and neither the interest of the mortgagee or mortgagor will be advanced by forbidding purchases by the mortgagee. The security of the mortgagee would be less valuable and the mortgagor would lose the benefit of the competition of the mortgagee upon the sale.

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There is less danger of oppression and abuse of the creditor in agreeing upon the conditions of the security and the power of sale at the time of giving the mortgage, when the mortgagor is free to act as his interests and judgment prompt, than after the relation of mortgagee and mortgagor has been created and the debt becoming due, the latter is in a greater or less degree in the power and at the mercy of his creditor. In *Dobson v. Racey* (4 Seld., 216), a permission to the mortgagee to acquire the title to the mortgaged property without a sale, given by the mortgagor after the making of the mortgage and under which the mortgagee had acted, and acquired the title by means of a conveyance through a third party was held valid and effectual to foreclose the equity of redemption. The power of sale here was in all its terms legal and valid, and such as the parties were competent to agree upon and was faithfully and fairly executed after personal notice to the mortgagor, and the sale effectually foreclosed the equity of redemption of the plaintiff. This conclusion renders it unnecessary to consider the question made upon the title derived under and through the Van Vechten mortgage.

The sale under the Wood mortgage barred the claim of the plaintiff upon the property and its proceeds, and the judgment should be affirmed with costs.

All the judges concurring.

Judgment affirmed. ✓

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STEPHEN LE ROY and others, Respondents, v. THE MARKET  
FIRE INSURANCE COMPANY, Appellant.

In an action upon a policy of insurance, where the survey referred to in the policy, in the usual manner as a part thereof, is proved to be false and inaccurate, the insured cannot recover, although he did not understand the survey in question to be the one mentioned in the policy.

Accordingly, a charge that, in such a case, *unless the parties intended the same survey as, and understood it to be, the one in fact named in the policy*, the minds of the parties never met as to the conditions and warranties



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contained in such survey, but did meet as to the contract of insurance, and the plaintiff could recover thereon without regard to any conditions contained in the survey,—*Held*, error.

(Argued February 17th, and decided February 28th, 1871.)

AN appeal from a judgment of the General Term of the Supreme Court in the second judicial district, affirming the judgment entered at the Dutchess county circuit for the plaintiff.

The action was brought to recover on a policy of insurance, whereby the plaintiff's paper-mill, machinery, etc., were insured to the amount of \$2,000 in defendant's company.

On the 5th day of June, 1861, the plaintiff effected the insurance in question, as follows: "\$1,233.75 on their part one and part two story frame building, with additions attached, including water-wheels therein, and occupied as a paper-mill, situated in Rhinebeck, Dutchess county, *as per survey No. 280, filed in the office of the Park Insurance Company, New York*, and \$766.25 on their fixed and movable machinery, etc."

The defence was an alleged breach of warranty contained in survey No. 280.

The plaintiff claimed, and attempted to prove, that survey or paper marked "D," or No. 280, put in evidence, never was designed or intended by either party, and was not in fact the survey No. 280 mentioned in the policy in suit. He also attempted to show that the paper, No. 280, was drawn up by one Phillips, an agent of the defendant.

The court charged the jury that one of the principal questions in the suit was, whether the application and survey (280) was the application or survey upon which the policy of the defendant was issued; that, if the paper 280 was intended and agreed to be a part of the policy in the present case, then, in case the facts were not as therein stated, the plaintiff could not recover. "You are to determine, as a question of fact, whether the condition was annexed to the policy, and was so understood by the parties, or not. If not so understood by

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both parties, then I charge you that, though their minds met in the issuing of a policy of insurance, they did not meet in the annexing of conditions which would destroy it, and the plaintiffs will yet be entitled to recover."

The defendant's counsel requested his honor to charge, "if the defendant supposed the paper 280 was the survey and application on which the policy was issued, and the plaintiffs did not, then there was no contract, and the plaintiffs cannot recover;" which his honor refused to charge.

The jury found a verdict for the plaintiffs for \$2,066.11, the amount claimed in the complaint.

*John Thompson*, for the appellant, cited 2 Den., 75; 25 Barb., 497; 2 Comst., 43; 6 Wend., 494; 3 Seld., 370; 3 Dow., 255; 15 N. Y., 496.

*Homer A. Nelson*, for the respondents, cited *Rowley v. The Empire Ins. Co.* (36 N. Y., 550); *Plumb v. Cattaraugus Ins. Co.* (18 N. Y., 392).

GROVER, J. From that portion of the charge excepted to by the defendant's counsel, and from the refusal to charge as requested, the jury must have understood the court as charging that the plaintiffs were entitled to recover, although the survey 280 was upon file in the office of the Park Company, and was the paper referred to as the survey in the policy issued by the defendant, upon which the action was brought; unless they further found that it was so understood by both parties, that, in case it was not so understood by both, the minds of the parties met in issuing a policy of insurance, but they did not meet in the annexing conditions which would destroy it, and, therefore, the former would be valid, and the latter void. This was erroneous. There was but a single entire contract between the parties. This was a policy of insurance upon the property, upon the terms and conditions therein expressed. The policy refers to survey No. 280, filed in the office of the Park Insurance Company, as the survey and description of

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the property insured; and the conditions attached to the policy make this a part thereof, and a warranty of the truth of the statements therein made. If the defendant issued the policy, incorporating therein this paper as a part of the contract, by a reference thereto, this part cannot be rejected, and the residue upheld upon the ground that the plaintiff, when he received the policy, supposed that it was another and a different paper, which had been filed in the Park office to which reference was made in the contract. From aught that appears in the case, the latter was the sole ground upon which the verdict was rendered by the jury. The question, whether this paper, No. 280, was on file in the Park Company's office, and was the survey referred to in the policy, as claimed by defendant, was not submitted to the jury in a way to make their finding upon that the basis of their verdict; but the question really submitted was, whether the plaintiff supposed this was the paper, with instructions to find in his favor, in case he supposed it was not. Had the former been the question submitted, with instructions to find for the plaintiff in case the jury found that the paper, No. 280, was not on file in the Park office, and the one referred to in the policy, a different question would have been presented. The rights of the parties, upon such a state of facts, were determined by this court in *Le Roy v. The Park Insurance Company* (39 N. Y., 90). The counsel for the respondent insisted that, as it appeared from the evidence that Phillips, the agent of the defendant, drew paper No. 280, the defendant was thereby estopped from contradicting the facts therein stated, and that he could not, therefore, have been prejudiced by the charge excepted to, if erroneous. If the counsel is right in the premises, he is in the conclusion, as the only defence relied upon was that the warranty contained in paper 280 was broken. *Rowley v. The Empire Insurance Company* (36 N. Y., 550), is relied upon as the authority showing that the defendant was estopped. This might be answered by the fact that the evidence was somewhat conflicting as to the extent of Phillips' and the plaintiff's acts in making that paper, and that,

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therefore, the facts should have been submitted to the jury. But the real answer is, that Phillips was not, at the time, acting as the agent of the defendant, in any possible sense, in regard to this paper. It was not made with any reference to any policy issued or to be issued by the defendant. The case of *Rowley v. The Empire Insurance Company*, if correctly decided, is not applicable to this case.

The judgment appealed from must be reversed, and a new trial ordered; costs to abide event.

All the judges concurring,

Judgment reversed, and new trial ordered.

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JOHN KERBY, Respondent, v. KIERAN B. DALY, Appellant.

A mechanic's lien can only cover labor performed and materials furnished by the party claiming it, including labor performed by persons employed by him and materials purchased by him on his own credit and used in the construction; but it does not extend to materials or labor (although actually paid for by the claimant) procured by him as the agent for the defendant, and in his name and on his credit.

Accordingly, where it is found that the plaintiff, the claimant of a mechanic's lien against the defendant, had made a special contract, for and in behalf of the defendant, with a third party to do certain work on the building, and had subsequently paid the whole sum due under such contract.—*Held*, that the sum so paid could not be included in the plaintiff's lien upon the premises.

(Argued December 21st, 1870; decided March 21st, 1871.)

APPEAL from the judgment of the General Term of the Supreme Court, of the Second judicial district, affirming a judgment for the plaintiff entered upon the report of a referee.

The action was brought to foreclose a mechanic's lien for \$8,743, part of a balance claimed by plaintiff to be due for work, labor and materials furnished by him in the erection of certain buildings for defendant. The defendant claimed that the work and materials were furnished in pursuance of a special contract, but the referee found otherwise. There was

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Opinion of the Court, per RAPALLO, J.

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included in the recovery by the referee a bill of \$1,511.06 for slating and tinning by one Dugan, the facts and finding as to which are sufficiently stated in the opinion.

*W. F. Shepard*, with *Odle Close*, counsel for appellant.

*Mills & Cochran*, with *J. O. Dykeman*, counsel for respondent.

RAPALLO, J. The plaintiff was entitled to a lien only for labor performed and materials furnished by him. These, of course, include labor performed by persons employed by him, and materials purchased by him on his own credit and used in the construction. But he could not include in his lien materials or labor procured by him as the agent for the defendant, and in his name and on his credit. For these the defendant was liable directly to the party performing the labor and furnishing the materials, and the plaintiff could not, by afterward voluntarily paying for such labor and materials, acquire a lien therefor on the defendant's building.

As to most of the items of materials, etc., in dispute, the plaintiff testifies that he bought them in his own name; but he declines so to testify in relation to the bill of John Dugan for slating, etc. He says that he made a contract with Dugan, but that he cannot say whether he made it in his own name or not. He says that he afterward told the defendant that he had certified Dugan's bill for the slating, and that Dugan would come to him (defendant) for the money, and that he (defendant) had to pay for it. Dugan says that he made the contract with plaintiff for the defendant; that when he made the arrangement he did not understand that the plaintiff was personally liable, but that the defendant was; that he made out his bill against the defendant as for work done for him and the plaintiff certified it as correct.

The referee finds that the plaintiff made a special contract for and on behalf of the defendant with Dugan for the slating of the roofs, for an agreed price of \$1,511.07; that the plain-

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tiff had paid to Dugan the whole of said sum, and that it is included in the plaintiff's lien and recovery in this action.

A specific exception is taken by the defendant to the allowance of this item.

There are some questions as to the evidence of this payment by the plaintiff to Dugan, which it is not necessary now to examine. The plaintiff could not, by paying Dugan's bill, acquire a lien for the amount so paid. No reason is shown why he should have paid it, except his subsequent promise, testified to by Dugan. The appellant's exception to this item must be sustained.

The other questions raised by the appellant relate to facts found by the referee. There being conflicting evidence on the points in dispute, the findings of the referee cannot be reviewed on this appeal.

The judgment should be reversed, and a new trial ordered, with costs to abide the event, unless the plaintiff shall, by stipulation, within thirty days, deduct from the judgment entered August 6, 1867, the sum of \$1,511.07, with interest from May 4, 1867, amounting together to the sum of \$1,538.04. In case he shall so stipulate, the judgment is affirmed as to the residue, without costs to either party on this appeal.

All the judges concurring,  
Ordered accordingly.

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JOHN KELLY, Sheriff, etc., Appellant, v. WILLIAM A. CRAPO  
and others, Respondents.

As a general rule, personal property has no locality, but follows, as to its disposition and transfer, the law of the domicile of the owner. A voluntary conveyance, therefore, valid under the laws of the State where the owner resides, will operate to transfer it wherever situated. But a statutory transfer, in proceedings under State bankrupt and insolvent acts, *in invitum*, can affect only such property as is actually situated within the territory of such State, and has, *proprio vigore*, no force beyond its limits.

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In this State, a title acquired under foreign bankrupt or insolvent proceedings will not prevail over the lien of creditors attaching under our own laws property found here.

The national territory and its laws are extended, by a legal fiction, to its vessels on the high seas; but no such principle is applicable to the laws or territory of a State.

No rule of comity requires our courts to subordinate the claims of our own citizens, under process provided by our own laws, to the title derived from statutory transfers in other States.

Accordingly, where, in a suit commenced in this State, against foreign debtors, citizens of Massachusetts, a warrant of attachment had been issued, and, upon the arrival of a seagoing vessel at the port of New York, such debtors' interest in the ship was seized by the plaintiff, as sheriff, under such attachment, and the defendants claimed as assignees of such debtors, appointed under the insolvency laws of Massachusetts prior to the issuing of the warrant,—*Held*, that the lien acquired by the levy must prevail over the title of such assignees; and this, although, at the time of the assignment, the vessel was not within our territory, but in the Pacific ocean.

(First argued, January, 1870; re-argument ordered, June, 1870: removed into this court by order, and here argued February 1, 1871, and decided February 27, 1871.)

APPEAL from a judgment of the General Term of the Supreme Court in the first district for the defendants, upon a verdict taken at the Circuit for the plaintiff, subject to their opinion.

The trial was had before Judge GOULD, and a jury, in 1863. The controversy is between the plaintiff, as sheriff of New York, claiming under an attachment by him, at the suit of a New York creditor, upon the ship *Arctic*, and the defendants, Crapo and others, as assignees appointed under the insolvent laws of Massachusetts. On the 24th of April, 1861, Edward Mott Robinson, residing in New York, commenced an action in this court against Gibbs, Jenney, and Allen, to recover the sum of \$6,004.06, being the amount due upon their two promissory notes, dated at Fairhaven, Massachusetts, on the 20th day of June, 1860, and the 3d day of September, 1860, respectively, each for \$3,000, at five months from date, and being made by Gibbs and Jenney, and indorsed by Allen; Gibbs, Jenney, and Allen, all reside in Massachusetts, and on

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that ground, upon the usual affidavit and undertaking, a warrant of attachment was issued to the plaintiff, as sheriff of the county, against their property, the proceedings being in all respects conformable to the provisions of the Code in such cases.

On the 30th of April, 1861, the ship Arctic arrived at New York direct from the Pacific ocean, and the plaintiff on that day seized her in the harbor, and under the warrant attached one undivided half of her, as being the property of Gibbs, Jenney and Allen. On the 10th of June, the defendants, Crapo, and others, claiming to be themselves the owners of the property attached, made application as provided by the Revised Statutes in such cases, for an appraisement of its value. It was accordingly appraised at \$3,000, and the vessel was released from custody, and delivered to the claimants upon their executing to the sheriff, with the defendants, Williams and Minturn, as sureties, the bond required by the statute, conditioned that in a suit to be brought on said bond, the claimants would establish that they were the owners of the share of the vessel attached at the time of its seizure, and in case of their failure to do so, that they would pay to the sheriff the amount of the valuation, with interest from the date of the bond. The present action is upon this bond. The attachment was never set aside or discharged, and Robinson, the attaching creditor, proceeding in the original action, recovered judgment for the whole amount claimed against Gibbs, Jenney, and Allen, upon which execution was issued, which remains in the hands of the plaintiff wholly unsatisfied.

The defendants, who claim the property attached, are the duly appointed assignees in solvency in Massachusetts, holding assignments from the judge of the Insolvent Court there, executed respectively, on the 12th of February, and 6th of March, and purporting to assign to them all the estate, real and personal, of the said Gibbs, Jenney, and Allen, who are admitted to have been, at the time of the taking of the proceedings in insolvency, owners of the property attached.



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The vessel belonged to the port of Fairhaven, in Massachusetts, and was there registered, as to one-half, in their names. No assignment was made by the insolvents themselves.

On the 12th of November, 1860, the Arctic was at Honolulu, in the Sandwich Islands, under charter to the American Guano Company of New York, to proceed from Honolulu to Baker's and Howland's islands, in the Pacific, and there receive on board a cargo of guano, and transport the same to New York; and on that day, or soon thereafter, she sailed from that port for Baker's and Howland's islands, in the Pacific, for a cargo, and thence on the 18th of January, 1861, for New York, where she arrived as before stated, on the 30th of April, and was then attached.

The assignees never had possession until after the attachment, and on the 2d of May, hearing that she had arrived, came from New Bedford to New York, and finding her in the custody of the plaintiff, obtained possession of her by giving the bond on which this action is brought.

At the trial, the court ordered a verdict for the plaintiff, subject to the opinion of the court at General Term. But the General Term gave judgment for the defendant and the plaintiff appeals to this court.

*Joseph H. Choate*, for the appellant, insisted that the attaching creditor was a citizen of the State of New York, and that his lien acquired by attachment is superior to that of assignees. (Story Conf. Law, § 48; Vattel Lib. 1, Ch. 19, § 213; *Holmes v. Remsen*, 20 Johns., 229; *Abrahams v. Plestoro*, 3 Wend., 538; *Hunt v. Johnson*, 23 Wend., 87; *Mosselman v. Caen*, 34 Barb., 66; *Olyphant v. Atwood*, 4 Bosw., 469; *Willets v. Waite*, 25 N. Y., 577; *Clark v. Booth*, 17 How. U. S., 322; *Ogden v. Saunders*, 12 Wheat., 219; *Harrison v. Sterry*, 5 Cranch, 289; *Milne v. Morton*, 6 Binn., 353.) That principles of comity did not require his lien to yield to the claim of assignees. (Wheaton's Intern. Law, Dana's ed., §§ 79, 80; Story Conf. Law, § 414; id., § 512; id., §§ 519-521;

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*Campbell v. Toucey*, 7 Cow., 64; *Gulick v. Gulick*, 33 Barb., 92; *Orcott v. Orms*, 3 Paige, 459.)

*William Stanley*, for the respondents, insisted that the "Arctic" was itself a part of the territory of Massachusetts, and therefore passed under assignment. (1 Kent's Com., p. 26; Wheaton on Int., Law, Dana's ed., § 106; 10 Wheaton, 66; *Hoyt v. The Commissioners of Taxes*, 23 N. Y., 224; *Plestorio v. Abraham*, 1 Paige, 237; *Perrie Gassies v. Jean Gassies Ballon*, 6 Pet., 761; *Moore v. Willett*, 35 Barb., 653; *Thuret v. Jenkins*, 7 Martin, 318.) That principles of comity required court to sustain assignees' title. (Story Conf. Law, §§ 29-38; *Parsons v. Lyman*, 20 N. Y., 112; *Bank of Augusta v. Earle*, 13 Pet.)

CHURCH, Ch. J. As a general rule personal property has no locality, but follows, as to its disposition and transfer, the law of the domicile of the owner. Hence a voluntary conveyance, valid according to the laws of the State where the owner resides, will in general operate to transfer such property wherever it may be situated, whilst a conveyance by operation of law, in proceedings under bankrupt and insolvent acts *in invitum*, can affect only such property as is actually situated within the territory of the State or country where the law is enacted. The law of a State has no force, *proprio vigore*, beyond its territorial limits. (Story's Conflict, §§ 410, 411.)

The defendants claim as assignees in proceedings instituted under the insolvent laws of Massachusetts against residents of that State, and the plaintiff, by virtue of an attachment issued according to the laws of this State in favor of one of its citizens. Although at one time a subject of controversy in the courts, it has become the fixed and settled doctrine of this State, and of nearly all of the States of the Union, that a title acquired under foreign bankrupt or insolvent proceedings will not prevail against the rights of attaching creditors under the laws of the State where the property

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is actually situated, and it is quite unnecessary to review the authorities or the history of the decisions on that subject. (*Holmes v. Remsen*, 20 J. R., 229; *Abrahams v. Plestoro*, 3 Wend., 538; *Hoyt v. Thompson*, 1 Seld., 320; *Willets v. Waite*, 25 N. Y., 577; *Zipcey v. Thompson*, 1 Gray, 243; *Clarke v. Booth*, 17 How. U. S., 377; *Harrison v. Sterry*, 5 Cranch, 302; *Blake v. Williams*, 6 Pick., 303; *Lanfear v. Sumner*, 17 Mass., 110.)

The necessity of a personal assignment to convey property out of the State seems also to have been recognized by the Massachusetts statute, under which these proceedings were instituted, which provides that the debtor, when required, shall make an assignment confirming the assignment authorized by the statute, for the purpose of "enabling the assignees to demand, recover and receive all the estate and effects assigned as aforesaid, *especially such part thereof, if any, as may be without this commonwealth;*" but no such assignment was made in this case.

It was conceded on the argument by the counsel for the defendants that, if the Arctic had been within this State at the time of the assignment, the latter would not have operated to transfer the title according to the principles before referred to, which have been so frequently recognized and settled by the courts of this and other States; but it is insisted that because the vessel was not actually within this State, but was on the high seas at the time, the recognized doctrine on that subject had no application.

To determine the legal effect of this circumstance is the precise question in this case. We have not been referred to any authority upon the precise point involved, nor am I aware that it has ever been decided.

In *Moore v. Willett* (35 Barb., 603), the assignment made in North Carolina was voluntary, and was therefore properly held good to transfer the title to a vessel at sea against an execution levied upon her arrival in this State. In *Thuret v. Jenkins* (7 Martin, 318), the vessel was transferred by her owner here, and this was held valid against subsequent attach-

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ing creditors in New Orleans. Both cases are distinguished from this by the material and controlling circumstance that the transfers were made by the owner himself, and not by operation of law. The case of *Hoyt v. Thompson* (23 N. Y., 224) has no application upon this point. There the question was whether personal property owned here, but actually situated in other States and employed therein in business or otherwise, is taxable to the owner here, under our statute subjecting all real and personal property *within this State* to be taxed. COMSTOCK, Ch. J., delivered a very able and elaborate opinion, which was concurred in by the court, holding that such property was not taxable in this State, first, on the construction of the statute itself, and second, because such property was taxable in the States where it was situated, and to impose taxation here also would subject it to double taxation; and in illustrating and qualifying this last position, he used the paragraph cited, that a ship at sea having no *situs* elsewhere would be taxable to the owner here. The remark was entirely correct and appropriate to the point being illustrated; but it has no force, as an authority, that a ship thus situated may be affected by proceedings *in rem* under insolvent laws of a State. The owners of the Arctic could have transferred a good title by a personal conveyance, which would have been respected in this State. In that event the fiction of law that the *situs* of personal property has relation to the domicile of the owner would have applied, but this rule has no application when the title is transferred by mere operation of law, which has no effect beyond the limits of the State.

“The law operates, if at all, *in rem*, and the State by whose legislation it is enacted having no jurisdiction over property without its territorial limits, it is entirely inoperative in respect to it.” (25 N. Y., 584.)

The principles of international law, and the established rules of comity, are invoked and strenuously urged to take this case out of the general rule. It is admitted that the vessel was without the territorial limits of Massachusetts, in fact; but it is said that every vessel upon the high seas is subject to

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the jurisdiction of, and is a part of the territory of the nation to which it belongs, and that the ownership and registering of the Arctic in that State enables the defendants to claim a constructive possession therein.

I cannot assent to this position. The jurisdiction referred to has been vested in the United States government, and is exercised for certain purposes of protection to ship and cargo, which the owner may, in various ways, receive the benefit of, but over which he has no control.

Offences committed upon vessels at sea are punishable exclusively in the federal courts, and, for that purpose, such vessels are deemed a part of the national territory.

Neither the domicile of the owner, nor the fact that a vessel sailed from a port within one of the States, enables that State to appropriate to itself the national character of the vessel, nor the protection which the flag of the country affords.

The national territory and its laws are extended, by a legal fiction, to its vessels at sea, from public necessity; but no particular locality is thus extended, nor is the operation of State laws thereby enlarged.

It is said, that the national character of the vessel does not prevent the control of the State over her as property. Certainly not, as it respects her owner, when within her jurisdiction, or as it respects the vessel, while within her territory; but all control and authority over her by State laws, beyond those limits, ceases.

Laws are of no force without power to execute them. A State possesses no power to execute its laws upon the high seas; and any attempt to do so would bring its authority in conflict with that of the United States. The vessel was as much beyond the reach of the process of a Massachusetts court, as she was beyond the reach of the New York attachment. Both were powerless to affect her in the Pacific ocean, while each had equal rights and interests in her, on account of her national character.

But the court below placed its decision for the defendants mainly upon the rule of comity. The learned judge who

delivered the opinion laid down the general principle, that "the line of demarcation in relation to this subject should be between property actually within our limits, at the time of the assignment in insolvency or bankruptcy, and property not actually within our limits." With great respect, I feel constrained to differ with him. I can find no authority, nor can I discover any reason, for such a distinction. Whether the vessel arrived the day before or the day after the assignment, is quite immaterial for the purposes of this question; and yet this rule would give the attachment preference in the former case, and the assignment in the latter. The important question is, not whether the vessel was within this State, at the time of the assignment, but whether it was without the State of Massachusetts, so as to be unaffected by the assignment.

The rule of comity is founded upon considerations of public utility and necessity, and should be observed in allowing the operation of foreign laws, and especially those of our sister States, whenever it can be done without prejudicing the rights of the State or its citizens. (Wheat. Int. Law, §§ 79, 80.) "In modern times, all States have adopted as a principle the application within those territories of foreign laws, subject, however, to the restrictions which the rights of sovereignty and interests of their own subjects require." (*Id.*)

Judge Story, in his Conflict of Laws, lays down the American doctrine in relation to assignments under bankrupt proceedings, as follows: "National comity requires us to give effect to such assignments only so far as may be done without impairing the remedies or lessening the securities which our laws have provided for our citizens." (§ 344.)

The well-established principle is, that the rule of comity ought not to prevail against the interests of our own citizens, and that we ought not to deny them the full benefit of all the remedies and securities provided by our laws.

There is no significance affecting this principle in the circumstance that the vessel was not within the State at the time of the assignment. When she arrived within our territory, she was free from any lien or claim, and, as we have

seen, was entirely unaffected by the insolvent proceedings instituted in Massachusetts.

The creditor here availed himself of the ordinary process of our courts, and by superior diligence acquired a lien, according to our laws, prior in time to the claim of the assignees; and the simple question is, whether we ought to deprive him of the advantages thus secured, and of the benefit of our laws, subordinate his rights to those of foreign creditors, and subject him to the inconvenience and expense of seeking dividends in a foreign State. There is no rule of comity requiring such complaisance. If it was a mere question of courtesy, we should promptly require the creditor to yield his claim, and render suitable indemnity for the delay and inconvenience which he had occasioned; but the question is one of far graver import. It involves the duty which a sovereign State, in the proper exercise of its powers, is required to discharge for the protection of the rights and interests of its own citizens.

It is suggested, as a possible reason for the distinction recognized by the court below, that credit might be supposed to be given in consequence of property actually situated here, while no such supposition could be indulged when not thus situated; but the question is one of protection to legally acquired rights under our laws. The rule adopted must be applicable to all similar cases, and should not depend upon abstract equities arising out of the circumstances under which the debt was contracted. Such considerations would tend to interminable confusion and litigation, and lead to arbitrary distinctions of difficult if not impracticable application; because, if the rule adopted by the court below rests on the reason suggested, then, if the reason does not exist in a given case, equity and fairness would demand a modification of it. Judge Story says, that "all comity of this sort must be built up, in a great measure, on the doctrine of reciprocity." The authorities before cited, and the cases therein referred to, will show that the rule in favor of the attaching creditor has generally been adopted by other States, as well as this,

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Opinion of the Court, per CHURCH, Ch. J.

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and that, unless uniformity can in some way be attained, it is the only just or practicable mode of dealing with the question.

In *Holmes v. Remsen* (20 J. R., 262), PLATT, J., in a very able opinion, which, although not expressly assented to by his associates at the time, has been adopted by the courts in this and other States, says: "If our citizens conduct themselves with reference to our own laws, in regard to the property of their debtors, *found within our jurisdiction*, it seems reasonable that they should reap the fruits which those laws promise them. This forms a standard of private rights which all can easily understand and conform to, but if an attachment against an absent debtor's property *found here*, may be superceded by a statutory assignment previously made at *St. Petersburg or Calcutta*, where the debtor resides, the remedy offered by our statute becomes illusory and hazardous. Let each government in such cases, sequester, and distribute the funds within its jurisdiction, and the general result will be favorable to the interests of creditors, and to the harmony of nations."

The refusal to apply the rule of comity has been extended to cases of voluntary transfers by an owner in our State, of property in another, where the transfer, although valid in the State where the owner resided, was contrary to the law or policy of the State where the property was found. *Ingraham v. Geyer* (13 Mass., 146), was the case of a voluntary assignment of a citizen of Pennsylvania, containing provisions not permitted by the laws of Massachusetts. PARKER, C. J., after commenting upon the question, whether the assignment was valid by the laws of Pennsylvania, says: "But supposing the assignment to have legal effect in the State of Pennsylvania, so as to bind the creditors in that State, it does not follow that it is to be received here to the prejudice of creditors who are our own citizens. It is not required by the comity of nations."

In *Zipcey v. Thompson* (1 Gray, 243), an assignment was made by debtors residing in New York, for the benefit of creditors giving preferences, which although valid in that



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State, was prohibited in Massachusetts. In a contest for property in the latter State, attaching creditors there prevailed, although the assignment was made before the "trustee process" was served. THOMAS, J., said: "The law of New York *proprio vigore*, cannot obtain here. It derives its effect only from the rule of comity, and that rule refuses to give force to laws of other States, which directly conflict with the policy of our own."

These decisions are cited not for the purpose of questioning their correctness, but to demonstrate that we are not likely to extend the rule in this case, beyond that which has been adopted by other States upon this subject.

It would be in the highest degree unjust to our own citizens, and humiliating to the State, if we failed to accord to them, that security and protection which is afforded by other States to their citizens.

The original question of preference between foreign assignees and attaching creditors, we have regarded as too firmly settled to be open for review.

We feel constrained to determine, both upon principle and authority, that personal property which has never been within the operation of proceedings under insolvent laws of a foreign State is liable to be attached by creditors here, although such property was not actually within this State at the time the foreign assignment was made, and that a vessel on the high seas, is not within the territory of any one State, so as to be affected by its local laws, or proceedings, *in rem* instituted under them.

The judgment must be reversed.

All the judges concurring, judgment reversed.

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Statement of case.

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NATHANIEL CHENEY, and others, Respondents, v. ALFRED C. WOODRUFF, and EDWIN W. NORTH, Appellants.

The purchaser at a mortgage foreclosure sale is not entitled to the rent of the premises accruing between the time of purchase and the time of delivery of the deed to him.

Where the plaintiffs, at a foreclosure sale of certain premises on the 10th of July, bid them in, paying ten per cent down, the remainder to be paid on the 30th of July, and, on that day paid the balance, and received a deed of the premises.—*Held*, that they could not maintain an action for the use and occupation between the 10th and the 30th of July.

(Argued February 9th, 1871; decided March 21st, 1871.)

APPEAL from the judgment of the General Term of the Supreme Court in the Second judicial district affirming judgment of Special Term in favor of the plaintiffs.

The plaintiffs claimed for use and occupation of a warehouse in the city of Brooklyn, for the period of twenty-one days, viz.: From the 10th day of July to and including the 30th day of July, 1867, alleging ownership by the plaintiffs during the period aforesaid, and occupation by the defendants with consent of the plaintiffs.

The answer denies the ownership of plaintiffs, and alleges that defendants occupied under a lease from the Phoenix Warehousing Company, who were the owners.

On the trial it was proved that on the 10th of July the plaintiffs purchased the premises at a sale under a decree of foreclosure; ten per cent of the purchase-money being payable at the time of sale, and the residue to be paid on the 30th of July, when the deed was to be delivered. These terms were complied with, and the deed was delivered on the 30th of July.

The court below decided that the plaintiffs were entitled to receive the rents from the date of their purchase.

A. H. Dana, for the appellants, insisted that the plaintiffs have no right to rents accruing before delivery of the deed.

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Opinion of the Court, per PECKHAM, J.

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(*Giles v. Comstock*, 4 Coms., 270; Rule 72 Supreme Court; *Brown v. Frost*, 10 Paige, 247; *Lathrop v. Ferguson*, 22 Wend., 116; *Strong v. Dollner*, 2 Sandf., 444; *Clason v. Corley*, 5 Sandf., 447; *Smith v. McCluskey*, 45 Barb., 610; *Taylor v. Robinson*, 36 Barb., 483; *Wood v. Hubbell*, 10 N. Y., 479; *Graves v. Berdan*, 26 N. Y., 489; *Talman v. Atlantic Ins. Co.*, 3 Keyes, 87; *Tuthill v. Wheeler*, 6 Barb., 362.)

*Joshua M. Van Cott*, for the respondents, insisted that the plaintiffs were the equitable owners from the 10th of July, and the subsequent delivery of the deed vested the legal title in them as of that date. (*Wright v. Douglass*, 2 Coms., 373-7; *McLaren v. The Hartford Ins. Co.* 1 Selden, 151; *Jackson v. McCall*, 3 Cow., 80; *Jackson v. Loan Officers*, 1 J. Cas., 81; *Jackson v. Dikeman*, 15 Johns., 309; *Fuller v. Van Geesen*, 4 Hill, 173; *Ostrom v. McCann*, 21 How. P. R., 431; *Cole v. Bristow*, L. R. 6 Eq. Cas., 160; *Mott v. Coddington*, 1 Robertson, 276.)

By the Court — PECKHAM, J. The sole question here is, has the purchaser at a mortgage foreclosure sale, after he gets his deed, a right to the rent accruing between the time of purchase and the time of delivering the deed?

It is insisted by the plaintiff's counsel, that all interest in the land is gone from the mortgagor at the instant of the auction sale, though the deed is not to be given, nor the money paid in full till some time thereafter; and that, although the purchaser does not thereby acquire the legal, he does the equitable title, which is perfected by the delivery of the deed; and that the deed, when given, extends back by relation to the time when the premises were bid off.

The plaintiff's counsel relies strongly upon *McLaren v. The Hartford Fire Insurance Company* (1 Seld., 151), to sustain this position.

That was a question of insurance, and the case was well decided upon another ground, viz., the violation of a provision in the policy.

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Opinion of the Court, per PECKHAM, J.

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But the case there most quoted from, and chiefly relied upon, to prove that the mortgagor had no interest in the premises after they were struck down at the foreclosure sale, denies the plaintiff's right to maintain this action. It was the case of *Paine v. Miller* (6 Ves., 349). The premises were sold at auction (not a foreclosure sale), a deposit of twenty-five per cent made, "and a proper conveyance to be executed upon payment of the rest of the purchase-money at *Michaelmas next*." There was some difficulty as to the title; it was not made clear till after Michaelmas; and, before the conveyance, the buildings thereon were burnt, and the purchaser then refusing to perform, a bill for specific performance was filed; and, in speaking of the rights of the parties, the lord chancellor remarked: "If in equity these premises belonged to the vendee, he would have a right to the rents and profits at *Michaelmas* (the time when the deed was to have been given), by relation; and he must pay the purchase-money, with interest from *that time*."

That is, although the deed was not delivered when it was due by agreement, yet the premises in equity then belonged to the vendee, and his rights were sustainable by relation.

This doctrine of relation, in this State, has generally been limited, in other cases, to the time when the deed should have been delivered; when it was due by the contract; and its non-delivery was not caused by any failure of the party seeking the relief. (*Wright v. Douglass*, 2 Comst., 373; *Fuller v. Van Geesen*, 4 Hill, 171; *Wells v. Lathrop*, 22 Wend., 121; *Jackson v. Ramsay*, 3 Cow., 75).

In this last case, which is an instructive one, it was held that, prior to 1820, when the statute in this State was first passed allowing judgment debtors fifteen months in which to redeem, a purchaser at a sheriff's sale, who had paid his bid, but did not receive his deed for several years thereafter, and not until after issue joined in an ejectment suit against him, was entitled to the benefit of the deed in defence, without pleading it *puis darrein*, and that it related back to the sheriff's sale, the time when it was due.

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Opinion of the Court, per PECKHAM, J.

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After the statute gave time to the creditor to redeem, the court held that the deed did not relate back, at least not so as to deprive the debtor of the use and occupation, or of the rents for the fifteen months. (*Rich v. Baker*, 3 Denio, 79; *Bissell v. Payne*, 20 Johns., 3.)

In giving this decision, the court, in the latter case, say, the terms of the statute do not require the construction to retrospect, and "it would be very inconvenient and unjust to deprive the judgment debtor of the rents accruing during that interval of time." The court add, that, if he cannot sue for such rents, "it follows that no person has a right to collect them, and the tenant during that time cannot safely pay his rent; for it is uncertain whether a deed will be given at all, or, if given, whether it will be to the purchaser at the sale or to some subsequent judgment creditor."

The same reasoning, in a degree, applies to this case. Such a rule as claimed would operate harshly upon the mortgagor, and it would sometimes embarrass the tenant. The sale might not be perfected, from the fault or inability of the purchaser. It might be set aside by the court for various causes, and a re-sale ordered.

But what right had the plaintiff to this rent? He had not possession of the premises until after this term had expired, nor had he any right to such possession. (*Brown v. Frost*, 10 Paige, 247; Rule 72, Supreme Court.) He had not paid all the purchase-money. He had no deed; until he received that, he had no title under a mortgage foreclosure, so as to claim any rent, and his claim, when he did receive the deed, was prospective. (*Astor v. Turner*, 11 Paige, 436; *Strong v. Dollner*, 2 Sandf. S. C., 444; *Clason v. Corley*, 5 id., 447; *Mitchell v. Bartlett*, 52 Barb., 319.)

As to the right to rent, it is of no moment whether the money had been paid or not, or whether the purchase-money was or was not upon interest. Such equities are all settled by the bidding, by the terms of sale; and the bids are regulated accordingly.

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Statement of case.

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Whether the money is all paid at the time of the bid, or chiefly when the deed is to be delivered, or whether the rents shall be received from the day of sale or the day of the deed's delivery, is of no moment as to the equities of the parties. These things all regulate the bidding, where the principles governing them are understood.

The cases already cited establish that this doctrine of relation is a fiction for promoting justice; and though its application to this case is not recognized, I see no objection to its allowing a purchaser, after he receives his deed, to maintain an action for any injury to the premises inflicted after his purchase. It might, for that purpose, be placed upon the rule in equity, that what is agreed to be done is, in equity, regarded as already performed.

The judgment is reversed, and new trial granted; costs to abide the event.

All concurring, except ANDREWS, J., who took no part,  
Ordered accordingly.

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WILLIAM PHYFE, Respondent, v. CHARLES EIMER, B. G.  
AMEND and PAUL AMEND, Appellants.

One of full age, and acting *sui juris*, can waive a statutory, or even a constitutional provision in his favor, affecting simply his property or alienable rights, and not involving considerations of public policy.

The provision of the act of 1818 (section 181), is clearly intended as a protection to the tenant against his agreement to pay rent, after the demised premises, or a portion of them, have been condemned for a public purpose and as an indemnity to him for the consequent loss or diminution of value of his term. But it does not incapacitate him from making, with his landlord, a contract waiving such protection, if he finds it to his advantage so to do.

Where the defendants took a lease from the plaintiff of certain stores in the city of New York, contracting with special reference to the then anticipated taking of a part of the demised premises for a city improvement before the expiration of the lease, and covenanted that, in such event, they would pay rent up to the time of the removal of such part of the buildings as should be taken, and from that time, the whole lease

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Opinion of the Court, per RAPALLO, J.

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should be terminated; and after the confirmation of the commissioners' report, they occupied the premises for nearly a year, paying rent, and in November, 1868, obtained an agreement from the plaintiff, indemnifying them against all claims of the city for rent, and they left the premises January 1st, 1869, the premises not being actually taken by the city till April 17th, 1869.—*Held*, that the plaintiff could recover for the quarter's rent accruing February 1st, 1869.

(Argued February 6th, 1871; decided March 21st, 1871.)

APPEAL from a judgment of the General Term of the Superior Court of the city of New York affirming a judgment for the plaintiff upon a verdict rendered at the Circuit by direction of the court.

On the 26th of September, 1867, the plaintiff leased to the defendants, the three upper lofts of No. 184 Fulton street, in the city of New York, for \$2,500 a year, payable quarterly. The lease, by its terms, expired May 1st, 1871, unless sooner ended by the *actual removal of the building* by the city, for the purpose of opening or extending Church street, rent to be paid up to such event.

The report of the commissioners, appointed in the proceedings taken for opening and extending the street named, was finally confirmed December 30th, 1867. The premises in question, except a few feet, were required and taken. The opening of the street and removal of the building actually took place April 17th, 1869.

The defendants remained one year subsequently to the confirmation, paying the plaintiff \$2,500, and voluntarily abandoned the premises January 1st, 1869. This action was upon the lease for the quarter's rent accruing afterward. Additional facts are sufficiently stated in the opinion of the court.

*John B. Perry*, for the appellant.

*Livingston K. Miller*, for the respondent.

RAPALLO, J. We do not think it necessary, in this case, to pass upon the questions, elaborately argued on the part of the

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Opinion of the Court, per RAPALLO, J.

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appellant, as to the existence of a power, under the act of 1818, to suspend the street extension for fifteen months, and as to the time when, and manner in which, this power, if existing, must be exercised by the common council.

Assuming, for the purposes of the present case, that the counsel for the appellant is right in his position, that the title to that portion of the demised premises which has been taken for the extension of Church street passed to the corporation at the date of the confirmation of the report, December 30, 1867, or at the expiration of four months from that time, such change of title does not necessarily preclude the plaintiff from recovering the rent in question, provided there was an express agreement between the parties, on a valid consideration, that the defendants would, notwithstanding the change of title, pay the rent to the plaintiff, until actual eviction, and look to him for indemnity against any claim by the city for the same rent.

It is contended, on the part of the appellants, that such an agreement is void, first, as being in contravention of that portion of the act of 1818 (§ 181) which provides that, where part of a lot is taken, all contracts respecting the part so taken shall be discharged, and the rent shall be apportioned, and only the part equitably payable for the residue shall be demanded, and that no more shall be demanded or paid or recoverable for or in respect of the same; and, secondly, because such an agreement is in contravention of the duties of the parties as citizens, and a fraud upon the public treasury.

The first objection is sufficiently answered by reference to the familiar principle, that a party of full age, and acting *sui juris*, can waive a statutory or even a constitutional provision in his own favor, affecting simply his property or alienable rights, and not involving considerations of public policy. (*Embury v. Conner*, 3 N. Y., 50; *Baker v. Braman*, 6 Hill, 47; *Kimball v. Munger*, 2 id., 364; *Kneetle v. Newcomb*, 22 N. Y., 244, 252.)

The statutory provision in question is clearly intended as a protection to the tenant against his agreement to pay rent,



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Opinion of the Court, per RAPALLO, J.

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after the demised premises, or a portion of them, have been condemned, and as an indemnity to him for the consequent loss or diminution of the value of his term. But it does not incapacitate him and his landlord from making a different agreement, if they find it to their mutual interest so to do.

In the absence of such an agreement, the tenant would be justified, where the demised premises are taken, and after the title of the city has vested, in abandoning the premises, treating his term as at an end, and refusing to pay rent.

Unless the city entered immediately, the landlord would, in such a case, remain in possession, and could hold as against all the world except the city; and so long as the city should refrain from asserting its title, he could enjoy the use of the premises, or if, while so holding, he should let them to another, such tenant would be bound to pay him rent until evicted by the city, and would be estopped from denying his landlord's title. Such would be the rights of the landlord, in the absence of any action on the part of the city. Whether the city could reach these rents, if it should make the claim, and the proper mode of doing so, are questions not involved in this case.

If the lessee, whose lease has thus been terminated, as to the whole or a part of the premises, chooses, instead of treating it as thus terminated, to contract with the landlord for the enjoyment of his temporary and uncertain right of possession, and the landlord, instead of enjoying the premises himself, allows to his tenant the benefit of such temporary occupation, and indemnifies him against any claim of the city for rent, there is a valid consideration for the agreement to pay the rent to the landlord.

We are unable to perceive any fraud or illegality in such a transaction. If, as is claimed by the appellants, they are bound to pay rent to the city from the time of the confirmation of the report, or from the expiration of four months thereafter, they have not discharged themselves from that obligation by agreeing to pay to the landlord, but have added to the security of the city by taking an indemnity from the landlord, which furnishes them with the means of payment.

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Opinion of the Court, per RAPALLO, J.

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If the city is to look to the owner of the land for the rent, its remedies against him are not impaired.

In the present case, the appellants, by their original lease, contracted specially with reference to the anticipated taking of a part of the demised premises for this improvement, before the expiration of their lease, and covenanted that in such event they would pay rent up to the time of the removal of such part of the buildings as should be taken, and that from that time the whole lease should terminate, instead of the rent being apportioned as provided by the statute.

The parties made a convention between themselves, which in their judgment was better adapted to the protection of their respective interests, than the provisions of the statute, and in so far as the statute operates merely to regulate their rights as between themselves, they had power so to do.

But, in addition to this, after the confirmation of the commissioners' report, the appellants continued for nearly one year to occupy the premises, and to pay rent as agreed; and, on the 4th of November, 1868, at their request, the plaintiff delivered to them an instrument of indemnity, reciting the proceedings and the title of the city, and that the appellants desired to continue in the occupation of the premises, that the plaintiff claimed rent therefrom, and that the appellants were willing to pay it, and indemnifying them against all claims of the city for rent during the time they should pay rent to the plaintiff, and to the amount so paid.

The request for and acceptance of this instrument was of itself sufficient evidence of an agreement to pay rent to the plaintiff, for the use and occupation of the premises after the alleged change of title. Under this arrangement, the appellants continued to occupy the premises until January, 1869, when they voluntarily removed therefrom. The city did not interfere with the premises till April, 1869, and this action is brought to recover the quarter's rent due February 1, 1869.

We are of opinion, that, as between the parties to this action, the appellants having had the use of the premises, and having agreed to pay this rent to the plaintiff, they are bound

## Statement of case.

to do so, and that the rights of the city cannot be invoked to protect them against their own contract.

The judgment should be affirmed with costs.

All the judges concurring, judgment affirmed with costs.

CATHARINE BARHYDT, Executrix, and others, Appellants, v.  
EDWARD ELLIS, and others, Respondents.

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It is only when there is an inconsistency or repugnancy between them, which is irreconcilable, that the written parts of an agreement prevail over the printed.

In cases where, by the mere laches of the creditor, the surety's means of indemnity are impaired, his liability is discharged only to the extent of the loss sustained by reason of such laches.

Where the plaintiff's testator let certain premises by a lease to which he and the lessee alone were parties, in the body of which was inserted a written clause requiring him to give notice to the defendants, the sureties of the lessee, in case the rent should not be paid when due, who were thereupon to have the right upon payment of the rent, to take possession of the premises; and by the sureties' printed agreement signed by the defendants, and annexed to the lease, they agreed to pay upon default of the lessee without any notice of non-payment or proof of demand being made.—*Held*, that the two clauses were not inconsistent, and that the giving of the notice required by the lease, did not constitute a condition precedent to the recovery of the rent from the defendants, on failure of the lessee to pay it.

(Argued January 23d, 1871; decided March 21st, 1871.)

APPEAL from a judgment of the late General Term of the Supreme Court of the Fourth judicial district affirming a judgment dismissing the complaint.

The action was brought to recover of the defendants, as sureties, certain installments of rent of the "Eagle Hotel," Schenectady.

On the 27th of April, 1866, Nicholas Barhydt, now deceased, leased the premises to J. G. Carley, by a lease partly written and partly printed. In the body of the lease were the following written words: "and in case the said

## Statement of case.

rent is not paid when due, as aforesaid, then the said Barhydt is to notify the Messrs. Ellis, who are surety for the payment of the rent, and they are to have the right to dispossess the said Carley from the said premises, and to take possession of said premises themselves, on payment of said rent, as aforesaid, to said Barhydt."

A printed sureties' agreement annexed to the lease, and signed by the defendants, stipulated that on default by the lessee, they would pay the plaintiff's testator the rent in arrear, *without requiring any notice of non-payment, or proof of demand being made.*

This suit being brought on the failure of lessee to pay rent, the defendants insisted that the notice required in the body of the lease constituted a condition precedent to the recovery of rent from them, and that whatever notice was given was insufficient, and the Special Term having decided in their favor, and that decision being affirmed at General Term, the plaintiff appealed to this court.

*Samuel Hand and Alexander J. Thompson*, for the appellants.

*J. S. Landon*, for the respondents, insisted that plaintiffs were required to give notice. (*Ludlow v. Simmond*, 2 Cai. Cases, 1; *Walrath v. Thompson*, 6 Hill, 540; *Leeds v. Dunn*, 10 N. Y., 469; *McCluskey v. Cromwell*, 11 N. Y., 593-598; *People v. Vilas*, 36 N. Y., 459; *Miller v. Stewart*, 9 Wheat., 702; *Leggett v. Humphrey*, 21 How. U. S., 76; *Bonar v. McDonald*, 1 Eng. L. & Eq., 1; *N. W. Railway Co. v. Whinroy*, 10 Ex., 77.) That surety clause does not waive notice of default. (*Lord Arlington v. Merrick*, 2 Saund., 403-411; *Liverpool Water-works v. Atkinson*, 6 East., 507; N. Y. "Civil Code," 332, § 1363.) That contracts were to be taken together. (*People v. Saxton*, 22 N. Y., 309; *Benedict v. Ocean Ins. Co.*, 31 N. Y., 389; *Harper v. The Albany Ins. Co.*, 17 N. Y., 194; *Leeds v. The Mechanic's Ins. Co.*, 8 N. Y., 351.)

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Opinion of the Court, per RAPALLO, J.

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RAPALLO, J. The stipulation in the lease from Nicholas Barhydt to J. G. Carley, to the effect that, if the rent should not be paid when due, the lessor would notify the sureties, and that they should have the right to dispossess the lessee, and take possession of the premises on payment of the rent, was, in terms, made between the lessor and lessee; but the liability of the lessee for the rent was in no manner dependent upon the observance of that stipulation, or affected by its breach; nor did it form any part of the principal contract, for the performance of which the defendants were sureties, within the intent and meaning of the rule, that a departure from the terms of the principal contract will discharge the sureties.

This stipulation was wholly for the benefit of the sureties, and was doubtless intended to enable them to take possession of the premises on payment of the rent, in respect of which their principal might make default, and thus to protect themselves to some extent against loss by subsequent defaults on his part.

The proper place for this stipulation was in the agreement of suretyship, for if effect can be given to it, it must operate not as between the lessor and lessee, but as between the sureties on the one part, and the lessor and lessee on the other part.

Assuming that the lease and the contract of suretyship are to be construed as one instrument, and that the defendants can claim the benefit of the covenant to give notice as if made in terms with them, the vital question in the case is, whether the giving of the notice was a condition precedent to their liability for the rent, or whether the covenant to give notice, and the agreement of the sureties to pay the rent, are independent agreements.

It seems to have been taken for granted, on the part of the respondent, that, wherever a guarantor is entitled to notice of the default of his principal, the giving of the notice is necessarily a condition precedent to the enforcement of the liability of the guarantor; and that, therefore, a stipulation on the part of the creditor to give notice of default, and an agreement in

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Opinion of the Court, per RAPALLO, J.

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the same instrument, on the part of the guarantor, to pay the debt without such notice, are so inconsistent and irreconcilable that one or the other must be stricken out, or held void.

Unless this position can be maintained, the cases which have been cited, holding that, where an instrument is partly written and partly printed, the written will overrule the printed part, have no application. Effect must be given, if possible, to every part of an agreement; and it is only when there is an inconsistency or repugnancy which is totally irreconcilable, that a discrimination will be made as to which part shall be made to yield to the other. (*Harper v. N. Y. City Ins. Co.*, 22 N. Y., 443; *Harper v. The Albany Mut. Ins. Co.*, 17 id., 198.)

We are of opinion that there is no such irreconcilable repugnancy in the present case, between the stipulation to give notice and allow the sureties to take possession, and the absolute engagement to pay the rent, though notice should not be given.

If the giving of notice had, by the terms of the contract, been made a condition precedent to the liability of the sureties, then the subsequent clause, dispensing with notice, would be manifestly repugnant, and both could not stand.

But it was competent for the parties to make independent agreements in this respect, and to declare them to be independent.

In this State a guarantor is not, in general, entitled to notice of default of his principal. (*Brown v. Curtis*, 2 N. Y., 225; *Van Rensselaer v. Miller*, Hill & Denio Supp., 237.) But there is no inconsistency in a surety being entitled to notice of the default of his principal; and yet the consequence of not giving the notice being to exonerate him only to the extent of the damage sustained by reason of the omission.

Judge STORY, in *Wilder v. Savage* (1 Story, 22, 35), says: "I take the doctrine to be clearly settled, that, upon a guaranty, to discharge the guarantor, there must not only be a want of notice within a reasonable time, but there must also be some loss or damage sustained by the guarantor, and that,

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Opinion of the Court, per RAPALLO, J.

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if there be a loss or damage, the guaranty is not totally discharged, but only *pro tanto*, to the amount of the loss or damage." (See authorities cited, and also *Union Bank v. Coster's Executors*, 3 N. Y., 213.)

Mere omissions do not have the same effect as positive acts of the creditor, or dealings between the creditor and principal debtor, whereby the position of the surety is changed. Such dealings are, by the civil law, held to be conclusive evidence of an intention to discharge the sureties; and the extent of the injury will not be inquired into. (Story Eq. Jur., 325, 833.)

But in cases where, by the laches of the creditor, the surety's means of indemnity are impaired, his liability is discharged only to the extent of the loss sustained by reason of such neglect. (*Schrappel v. Shaw*, 3 N. Y., 459; *Capel v. Brittie*, 2 Sim. & St., 457.)

There seems to be no good reason why these principles should not be applicable to a case where the guarantor is entitled to notice by the terms of his contract, unless, by the reasonable construction of the contract, the giving of the notice is a condition precedent. Even in the absence of the express stipulation to pay without notice, it is not clear that the stipulation to give notice was, under the provisions of this contract, a condition precedent. It was not so made in terms; it did not constitute the whole consideration of the guaranty, and its breach could be paid for in damages. (*Boone v. Eyre*, 1 H. Bl., 273, note *a*; *Jones v. Barkley*, Doug., 690; 2 Parsons on Contracts, 5th ed., 525, 528, 676, 677; 3 Kent's Com., 11th Ed., 124.)

These considerations are not conclusive. (1 Seld., 257.) The intent of the parties must govern, but the clause which is sought to be stricken out as repugnant, removes any doubt which might be entertained on the point. It does not relieve the landlord from his obligation to give the notice, or from responsibility for not giving it; but it declares, in substance, that the obligation of the sureties to pay shall not depend upon its being given.

It is possible that the actual intention of the parties may have differed from that expressed in the agreements as executed; but there is no evidence or finding in support of that part of the defendants' answer which seeks a reformation of the instrument on that ground.

It is to be observed, that the object of giving the notice appears by the lease to be, to enable the defendants to take possession of the premises, after default in the payment of rent, and protect themselves against loss from future defaults. Even if the notice were given, they would be obliged to pay the rent in arrear; they were liable for that, at all events.

The delay in giving the notice did not prevent them from taking possession when the notice was in fact given, if they desired to do so, and the agreement gave them the power.

Assuming that they were ignorant of the default of the lessee, the effect of the delay was not to deprive them of their right, if any, to take possession, but simply to lead them to forego its exercise during the period between the default and the giving of the notice, and they may, perhaps, have thereby lost the value of the use of the premises during that period.

Whether they could or would have taken possession, if they had had notice, what would be a reasonable time for giving the notice, and the amount of loss occasioned by the omission, are questions that will arise in case they set up a claim for damages, and need not now be determined.

The judgment should be reversed and a new trial ordered, with costs to abide the event.

ALLEN, GROVER and FOLGER, JJ., concurred, CHURCH, Ch. J., and PECKHAM, J., dissented; ANDREWS, J., took no part.

Judgment reversed and new trial ordered, costs to abide the event.



## Statement of case.

CAMDEN C. DYKE, Respondent, v. ERIE RAILWAY COMPANY,  
Appellant.

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JACOB B. FLOYD, Respondent, v. THE ERIE RAILWAY COM-  
PANY, Appellants.

The *lex loci contractus* determines the nature, validity, obligation and legal effect of a contract, and prescribes the rule of its construction and interpretation, unless it appears to have been made with reference to the laws and usages of some other State or government, as where it is to be performed in another place; when, in conformity to the presumed intention of the parties, the law of the place of performance furnishes the rule of interpretation.

Upon principles of comity, effect is sometimes given by the courts of a State to foreign laws; but in matters of contract such effect is conceded to the statutes of other States, only to carry out the intent of the parties, never to qualify or vary the effect of a contract made between persons not citizens of such foreign State, or subject to its laws, and not made with reference to those laws.

Where the plaintiff purchased from the defendant, a railroad corporation, created by the laws of this State, at a station within this State, a passenger's ticket thence to the city of New York, and having taken passage in its cars to be carried thither, received injuries upon a portion of the road situated in the State of Pennsylvania, through the negligence of the defendant's servants.—*Held*, that the amount of damages for such injuries, recoverable by him, was not affected by a statute of Pennsylvania limiting the amount of recovery in similar cases.

*It seems* that the action in such cases, whatever its form, is based upon the contract. ALLEN, J.

(Argued February 18th, and decided March 21st, 1871.)

APPEALS from the General Term of the Supreme Court in the Second district in Dike's case, and from the General Term of the Supreme Court in the Sixth district in Floyd's case.

These actions were to recover damages for personal injuries sustained by the plaintiffs while passing over the road of the defendant as passengers, caused by the negligence of the defendant's servants and agents. The defendant is a corporation existing under the laws of the State of New York, owning and operating a railroad for the carriage of freight and passengers between the cities of Buffalo and New

## Statement of case.

York, in that State, and the intermediate places, running its road, *en route* between the termini named, for short distances in the States of Pennsylvania and New Jersey by the permission of those States respectively.

Each of the plaintiffs purchased a ticket and took passage on the defendant's road, on the 14th of April, 1868, from stations in this State to the city of New York, and while in transit from the place of departure to the city of New York, and upon a part of the road in the State of Pennsylvania, sustained the injuries complained of. By an act of the legislature of Pennsylvania, passed April 4th, 1868, the recovery in actions then or thereafter instituted against common carriers or railroad corporations for personal injuries is limited to \$3,000. Upon the trials, it was claimed in behalf of the defendant that the rights of recovery of the plaintiffs were controlled by this act. The claim was overruled by the judge, and each of the plaintiffs had verdicts in excess of the limit prescribed by the Pennsylvania statute, Dike for \$35,000, at the Kings Circuit, and Floyd for \$15,000 at the Tioga Circuit, and judgments upon such verdicts were affirmed by the Supreme Court at the General Terms. The defendant has appealed to this court.

*John Ganson*, for the appellant, insisted that the contract was to be executed partly in New York and partly in Pennsylvania, and that each portion is to be governed by law of place of execution. (Story's Conf. of Laws, § 280; 2 Kent, 459 to 462; *Jacks v. Nichols*, 1 Seld., 178; *Curtis v. Leavitt*, 15 N. Y., 227; *Bowen v. Newell*, 13 N. Y., 290; Story on Cont., § 655; *Pomeroy v. Ainsworth*, 22 Barb., 118; *Pope v. Nickerson*, 3 Story, 498; *Elkins v. East India Rubber Co.*, 1 Pierre Williams, 395; *Cooper v. The Earl of Walgrave*, 2 Beavan, 282; *Fisher v. Bidwell*, 27 Conn., 363-71; Story's Conf. of Laws, § 558; *Hyde v. Goodnow*, 3 Com., 266; *Everett v. Vandryes*, 19 N. Y., 436; *Mostyn v. Fabrigas*, Cowp., 161; S. C. Smith's Leading Cases; *Martin v. Hill*, 12 Barb., 631; *Smith v. Condry*, 1 How. U. S., 28; 2 Adm. & Ec. R.

## Statement of case.

Law Rep., 3 *The Halley*; *Phillips v. Eyre*, Law Rep., 4 Q. B., 225.) That the plaintiff's right to recover depended on the law of the place where the accident occurred. (2 Story Confl. of Laws, § 558; Peters' C. C. R., 330; Law Rep., 2 Adm. & Eccl., 10; *Whitford v. Panama R. R. Co.*, 23 N. Y., 465; *Richardson v. The N. Y. Central R. R. Co.*, 98 Mass., 85; *Melan v. The Duke de James*, 1 Bos. & Puller, 138; *Campbell v. Rogers*, 2 Handy's R., Ohio, 110.)

*Daniel Pratt*, for the respondent Floyd, insisted that the contract was to be governed by the laws of this State. (*Everett v. Vandryes*, 19 N. Y., 436; *Cutler v. Wright*, 22 N. Y., 472; *Jewell v. Wright*, 30 N. Y., 259; *Hale v. The Newburgh Steamboat Co.*, 15 Conn., 539.) That amount of damages depend on law of New York. (*Sherman v. Garrett*, 4 Gillman, 521; *Gale v. Easton*, 7 Metc., 14; *Scott v. Seymour*, 1 Hurl. & Colt., 219; *Andrews v. Herriot*, 4 Cow., 508; *Lincoln v. Battelle*, 6 Wend., 475; Story's Confl. of Laws, §§ 291, 296, 307.) That defendant's liability was the same whether the action was based upon the contract or the tort. (*Buddle v. Wilson*, 6 Term R., 369; *Powell v. Layton*, 2 New R., 365; *Weall v. King*, 12 East, 452; Gra. Pr., 2 ed., 92, 93; 1 Bac. Abr., 24.)

*James Emott*, for the respondent Dyke, that the contract was subject to the law of New York, cited in addition *Peninsular Co. v. Shand* (3 Moore, P. C., N. S., 272c). If the action be held to be in tort, still the law of New York controls. (Story's Confl., §§ 19, 20, 22, 23; *Blanchard v. Russell*, 13 Mass., 4; *Bank of Augusta v. Earle*, 13 Peters, 584; Huberus Lib., 1, title 3, § 240; *Scott v. Seymour*, 1 Hurlst. & Colt., 219; Swabey R., 526.) On the question of comity, he cited Story Confl., §§ 31, 38; Phillimore Internat'l. Law, part 4, 746; Burge Col. and For. Law, 111, 770, 778; *The Halley*, 2 Eng. R. Privy Council, 193; Savigny Private Int. Law, by Guthrie, § 370, pp. 151, 152; Grotius de Jure Belli, Lib., 2, chap. 17, § 1; Digest Lib., 9, title 2, 29, 2.)

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Opinion of the Court, per ALLEN, J.

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ALLEN, J. The only question to be considered upon this appeal is as to the effect of the Pennsylvania statute, limiting the amount of the recovery in actions of this character. It is conceded that the statutes of one State are not obligatory upon the courts of other States; that they have not, *proprio vigore*, the force of law beyond the limits of the State enacting them. But it is sought to bring these actions within the operation and effect of the foreign statute upon the ground that the contracts were made with reference to the laws of that State, and the causes of action arose there.

The generally received rule for the interpretation of contracts, is that they are to be construed and interpreted according to the laws of the State in which they are made unless from their terms, it is perceived that they were entered into with a view to the laws of some other State. The *lex loci contractus*, determines the nature, validity, obligation and legal effect of the contract, and gives the rule of construction and interpretation, unless it appears to have been made with reference to the laws and usages of some other State or government, as when it is to be performed in another place, and then in conformity to the presumed intention of the parties, the law of the place of performance furnishes the rule of interpretation. (*Prentiss v. Savage*, 13 Mass., 20; *Medbury v. Hopkins*, 3 Con., 472; *Everett v. Vendryes*, 19 N. Y., 436; *Hoyt v. Thompson's Exr.*, id., 207; *Curtis v. Leavitt*, 15 N. Y., 227.) The contracts before us were made in the State of New York, and between citizens of that State. The plaintiffs were actual inhabitants, and the defendant was a corporation existing by the laws of that State. The contracts were for the carriage and conveyance of the plaintiffs over the road of the defendant, between two places in the same State, to wit, from stations on the line of the road, in the western part of the State to the city of New York. The duty and obligation of the defendant, in the performance of the contracts commenced and ended within the State of New York. Although the route and line of the defendant's road between the places at which the plaintiffs took their passage and their

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Opinion of the Court, per ALLEN, J.

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destination, passed through portions of the States of Pennsylvania and New Jersey, by the consent of those States respectively, the parties cannot be presumed to have contracted in view of the laws of those States. The contracts were single and the performance one continuous act. The defendant did not undertake for one specific act, in part performance in one State, and another specific and distinct act in another of the States named, as to which the parties could be presumed to have had in view the laws and usages of distinct places. Whatever was done in Pennsylvania, was a part of the single act of transportation from Attica, or Waverly, in the State of New York, to the city of New York, and in performance of an obligation assumed and undertaken in this State, and which was indivisible. The obligation was created here, and by force of the laws of this State, and force and effect must be given to it, in conformity to the laws of New York. (*Carnegie v. Morrison*, 2 Metc., 381, Per SHAW, Ch. J.) The performance was to commence in New York, and to be fully completed in the same State, but liable to breach, partial or entire in the States of Pennsylvania and New Jersey, through which the road of the defendant passed, but whether the contract was broken, and if broken, the consequences of the breach should be determined by the laws of this State. It cannot be assumed that the parties intended to subject the contract to the laws of the other States, or that their rights and liabilities should be qualified or varied by any diversities that might exist between the laws of those States and the *lex loci contractus*. The case of *the Peninsular and Oriental Steam Navigation Co. v. Shand* (3 Moore's P. C.<sup>N.S.</sup> 272), is somewhat analogous in principle to the case at bar. A passenger, by an English vessel belonging to an English company, from Southampton to Mauritius, *via* Alexandria and Suez, sustained a loss of his baggage between Alexandria and Mauritius, and it was held that the contract for the passage was to be interpreted by the law of England, the place where the contract was made. The Supreme Court at Mauritius had held that the contract was governed by the French law in force in Mauritius, and

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refused to the defendants the benefit of an exemption from liability for loss of property, to which they were entitled by the terms of the contract as interpreted by the laws of England, and the judgment was reversed, upon appeal, by the Privy Council.

Whether the actions are regarded as actions of assumpsit upon the contracts, or as actions upon the case for negligence, the rights and liabilities of the parties must be judged by the same standard. The form of the action concerns the remedy, but does not affect the legal obligations of the parties. In either form of action the liability of the defendant, and the rights of the plaintiffs, are based upon the contracts. The defendant owed no duty to the plaintiffs, except in virtue of the contracts and the obligations for the violation and breach of which, an action may be brought are only co-extensive with the contracts made. It follows, that the law of Pennsylvania cannot enlarge or restrict the liability of parties to a contract, which for its validity, effect, and construction, is subject to the laws of New York. The damages to which a party is entitled, upon the breach of a contract, or violation of a duty growing out of a contract, and the rule and measure of damages pertains to the right and not to the remedy. It is matter of substance, and the principal thing sought, and not a mere incident to the remedy for the principal thing. It is conceded, that the statutes of Pennsylvania have no intrinsic extra territorial force, and that they bind only within the jurisdictional limits of the State. Upon principles of comity, effect is sometimes given by the courts of a State to foreign laws. In matters of contract, such effect is accorded to statutes of other States, only to carry out the intent of and do justice between the parties, never to qualify or vary the effect of a contract between parties not citizens of such foreign State, or subject to its laws, and not made in view of the laws of such State. Effect will not be given by the courts of a State to foreign laws in derogation of the contracts, or prejudicial to the rights of citizens. (*Liverpool, Brazil, &c., Steam Navigation Company v.*

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*Benham*, 2 Law Rep., P. C. Cases, 193; *Hale v. N. J. St. Nav. Co.*, 15 Conn., 539; *Arnott v. Redfern*, 2 Carr. & Payne, 88; *Gale v. Eastman*, 7 Met., 14.)

The actions are not given by the laws of Pennsylvania. They grow out of the contracts and the duties resulting from the contracts, and are given by the common law, and, therefore, the laws of another State in an action brought here cannot prescribe the measure of damages, or limit the liability of the parties.

The judgments should be affirmed.

CHURCH, CH. J., PECKHAM, FOLGER, and RAPALLO, JJ., concurred. GROVER, J., did not vote, and ANDREWS, J., did not sit.

Judgment affirmed.

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JOHN DOUPE, Appellant, v. SIDNEY C. GENIN, Respondent.

Where a building has been injured by fire, the landlord cannot be compelled to rebuild or repair it for the benefit of his tenant, unless he has expressly covenanted to do so; and this rule applies as well to a tenant who has hired a portion of the building which is not directly injured by the fire, as to the lessee of the whole building or of the part destroyed.

Accordingly, where the roof and upper story of a building were partly destroyed by fire, and damage resulted to a tenant occupying the basement, by reason of the delay in repairing the roof.—*Held* error to charge the jury that it was the duty of the landlord to proceed with due diligence after the fire to put on the roof and protect the tenant's property from the weather, and that he was liable for any delay in so doing.

No such duty arises either from an implied covenant, or from the principle that the landlord, as the owner of the upper portion of the building, must so use it as not to injure the basement rented to the plaintiff.

(Argued February 16th; decided February 21st, 1871.)

APPEAL from an order of the General Term of the Superior Court of New York, reversing a judgment entered upon a verdict and ordering a new trial.

Action to recover damages for injuries to the plaintiff's goods and loss to his business from the omission of the

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Statement of case.

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defendant to repair the roof of the premises occupied by the plaintiffs.

The defendant demised to the plaintiff, to be used in carrying on the upholstery business, the store and basement (except the right to the other tenants to use the basement stairs), of the premises No. 707 Sixth avenue, New York. There was a provision in the lease that in case the premises should be so damaged by accidental fire as to make them untenable for more than thirty days, the rent should, at the option of the plaintiff, cease.

The upper part of the building was under lease to a man named Trenor, and was in his occupation. On February 1st, 1867, a fire broke out in an adjoining building, and spread to the building in question, and destroyed the greater part of the roof, and otherwise injured the upper portion of the building, though that portion leased to the plaintiff was uninjured.

The effect of the fire was to leave the plaintiff's premises untenable. The defendant, soon after the fire, commenced to restore the building, but the work was not completed till March 17th or 18th, and in the meantime the plaintiff's goods were damaged, and he offered evidence to show that he had suffered in his business.

The jury gave a verdict for the plaintiff, but on appeal to the General Term from the judgment entered thereon, the judgment was reversed and a new trial ordered, from which decision of the General Term the plaintiff appeals to this Court giving the usual stipulation.

The charge of the judge sufficiently appears in the opinion of the court.

*Abram Wakeman*, for the appellant, that the principle of "*sic utere tuo*," etc., applied. (Broom's Legal Maxims, 520, pp. 365, 367, 368; *Pisley v. Clark*, 35 N. Y., 520; *Ryland v. Fletcher*, 3 H. & L., 341; *Van Houten v. Coventry*, 10 Barb., 519.) That it was not essential that the defendant's conduct should have been with intent to injure.



## Opinion of the Court, per RAPALLO, J.

(Broom's Legal Maxims, 268; *Hay v. Cohoes Co.*, 2 N. Y., 160; *Van Pelt v. McGrane*, 4 N. Y., 110; *Pisley v. Clark*, *supra*; Taylor Landlord & Tenant, §§ 197-202.) The defendant used his own property negligently to the injury of the plaintiff. (*Beyth v. Birm. Water-works Co.*, 11 Exch., 184; *Benton v. Suarez*, 19 Abb., 61; *Eakin v. Brown*, 1 E. D. Smith, 36-43; *Bagnall v. London, &c., R. Co.*, 7 H. & N., 423, 448; 8. C. affd. 7 H. & C., 544; *Good v. Cockrell*, 17 Cal. R., 97). That protection to the roof was implied in the letting. (*Mayor v. Mabie*, 13 N. Y., 151; *Edgerton v. Paige*, 20 N. Y., 516; *Graves v. Berdan*, 26 N. Y., 498; *Stookwell v. Hunter*, 11 Metcalf, 455; *Roberts v. Haines*, 6 El. & Bl., 643-653; *S. C.*, 7 id., 625; *Humfries v. Brogden*, 12 Q. B., 739; Sherman & Redfield on Negligence, p. 61, § 56; *Eakin v. Brown*, 1 E. D. Smith, 36, 44; *Eagle v. Swansee*, 2 Daly, 140; Holt N. P., 7.)

*Jno. E. Parsons*, for respondent, that there was no obligation to repair. (*Howard v. Doolittle*, 3 Duer, 464; *Sherwood v. Seaman*, 2 Bosw., 127; *Mumford v. Brown*, 6 Cow., 475; *Carter v. Rockett*, 8 Paige, 437; *Hallet v. Wylie*, 3 Johns., 44; *Willard v. Tillman*, 19 Wend, 157; *Pomfret v. Ricroft*, 1 Saunders, 321; *Pindar v. Rutler*, 1 Term R., 312; *Leeds v. Cheetham*, 1 Simon R., 146; *Belform v. Wesden*, 1 Term R., 314; *Weigale v. Waters*, 6 Term. R., 488.) That the defendant's ownership of the rest of the building imposed upon him no duty toward the defendant. (*Mayor v. Corlies*, 2 Sand., 301; *Cheetham v. Hampson*, 4 T. R., 318; *Teall v. Barton*, 40 Barb., 137; *Calkins v. Barger*, 44 id., 424.) A covenant of quiet enjoyment only applies to title. (3 Hill, 830; 3 Duer, 464; Anon. Lofft., 460; 3 T. R., 584; 19 C. B., N. S., 246).

RAPALLO, J. This case appears to have been very fully considered at the General Term; and we concur in the conclusion there arrived at. The judge, for the purposes of the trial, charged the jury, in substance, that it was the duty of

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Opinion of the Court, per RAPALLO, J.

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the defendant to proceed with diligence, after the occurrence of the fire, to put on the roof and save the plaintiff's property from the storms, and that he was liable to pay the damage caused by any improper delay in so doing. Unless the law devolved this duty on the defendant, by reason of his demise to the plaintiff of the lower floors, or by reason of his ownership of the residue of the building, this charge cannot be sustained. The jury were not limited to an inquiry into the alleged misfeasance of the defendant in making the repairs after he began to do so, or into the alleged promise made by him subsequently to the fire, both of which allegations were controverted; but they were positively instructed, as matter of law, that it was his duty, immediately after the occurrence of the fire, to proceed with due diligence to put on the roof, and that he was liable in damages, if he neglected to do so. The fire took place on the 1st of February. At that time, one Trenor was lessee of the upper part of the building, and he continued to be such tenant, and to pay rent, until after the repairs were completed. The repairs were begun on the 19th February. The plaintiff occupied the rooms under Trenor's and the basement. The lease to the plaintiff contained no covenant on the part of the landlord to repair, but did contain a stipulation that, if the premises should be so damaged by accidental fire as to make them untenable for more than thirty days, the rent should cease, at the option of the plaintiff, until the same should be repaired.

It is not claimed that, if the plaintiff had been the lessee of the entire building, the defendant would have been under any obligations to repair; there being no covenant on his part so to do. It is well settled that there would have been no such obligation. But it is claimed that, in this case, the duty arose from the fact that the plaintiff's premises were rendered untenable by reason of damage to a part of the building not occupied by him, and which served as a protection to his premises, and that there was an implied covenant that such protection should continue, and also that, independently of any obligation resulting from the lease, the defendant, as

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Opinion of the Court, per RAPALLO, J.

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owner of the part of the building not occupied by the plaintiff, was bound, according to the maxim, "*sic utere tuo ut alienum non lœdas*," to keep his own part of the premises in such condition as to prevent injury to the plaintiff's premises.

In so far as the plaintiff's claim rests upon the supposed obligation of the defendant as lessor, it has no foundation in principle. When a building has been injured by fire, the landlord cannot be compelled to rebuild or repair it for the benefit of his tenant, unless he has so covenanted. And he owes no greater obligation to one, the use of whose tenement is impaired in consequence of the fire, than to one whose premises are destroyed, or directly injured by it. The doctrine contended for by the respondent was once broached in the case of *Pomfret v. Ricroft* (1 Wm's. Saunders, p. 322, 4th ed.), where RAINSFORD, J., expressed the opinion, that "if a man demise by deed a middle room in a house, and afterward will not repair the roof, whereby the lessee cannot enjoy the middle room, an action of covenant lies for him against his lessor." But the judgment in the case in which that opinion was expressed was reversed in the Exchequer chamber (1 Saund., 323); and Sergeant Williams, in his note (1 Saund., 322), considered that the principle of that case establishes that without an agreement, the landlord would not be bound to repair the roof, nor subject to an action for not doing so, but that the tenant might himself repair the roof as incident to the demise. The authorities upon which this opinion of RAINSFORD, J., was supposed to have been founded are disapproved in 1 Salkeld, 361, and are explained in note 1 above cited. See also, the dissenting opinion of TWYSDEN, J., in the above case, which was considered by SAUNDERS the better opinion, and which was sustained by the Court of Exchequer Chamber.

The case of *Graves v. Berdan* (26 N. Y., 498), cited by the respondent, holds that a tenant was not, even before the act of 1860 (chapter 345), bound to pay rent where he had no term in the land, but only in rooms in a building, and the support of his rooms, as well as the rooms themselves, were

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Opinion of the Court, per RAPALLO, J.

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destroyed by fire. Such was not the case here; but if it were, that case only goes to the liability of the tenant for rent, and does not hold that the landlord would be liable in damages, if he neglected to restore the support.

The second ground upon which the respondent seeks to sustain the charge is equally untenable. Independently of the objection that Trenor, the tenant of the upper part of the building, was the only party liable for any misuse of that part, at least from the 1st of February to the 19th, when the landlord entered to make the repairs, the maxim "*sic utere tuo*," etc., cannot be invoked in support of this charge. The judge instructed the jury that it was the duty of the defendant to proceed with due diligence, after the fire, to put on the roof and save the defendant's property from the storm. The jury were, by the charge, authorized to compensate the plaintiff for the damage caused by the simple omission of this supposed duty, and the consequent want of protection to the plaintiff's premises from the weather. The jury were not confined to injuries resulting from acts done on the defendant's premises, or from negligence in the process of making the repairs, or from any use made by the defendant of his own part of the premises, or from injury *caused* by any structure in that part of the premises. It is to such cases that the maxim applies. A man has no right so to construct his building, or to allow it to be in such a condition as to *cause* the water which falls upon it to flow upon his neighbor's premises; he is bound to protect his neighbor against injury caused by his own structures or resulting from his use of his own property. But in the absence of a contract, there is no principle upon which he can be held bound to erect any structure for the purpose of protecting his neighbor from the inclemency of the weather, or to replace any structure upon his own premises which has been destroyed, because while it existed it afforded such protection. There is no ground, therefore, upon which the defendant can be held liable for the simple omission to protect the plaintiff's property by replacing the roof. The plaintiff had the right to remove from the

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premises and cease paying rent till they were repaired; but he had no right to compel the defendant to protect him in remaining with his goods in the building in its exposed condition.

The judgment of the General Term and the order granting a new trial must be affirmed, and judgment absolute entered against the plaintiff pursuant to his stipulation, with costs.

All concurring except ALLEN, J., who, not having heard the argument, did not vote.

Judgment accordingly. ✓

MARY D. SLOAN, Respondent, v. THE NEW YORK CENTRAL  
RAILROAD COMPANY, Appellant.

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In an action against a railroad corporation to recover for injuries to the plaintiff, a passenger, the defendant's track superintendent being asked, on his cross-examination by the plaintiff, if he had not stated that he was not to blame for the accident, and that he could not get ties or materials to repair the road, answered that he had no recollection of such statement. Afterward a witness called by the plaintiff, was permitted, against the objection of the defendant, to answer the following question: "Will you state what you heard Townsend (the superintendent) say on Sunday morning about the track, and about his application for materials to put it in order, and what was said to him that drew it out?"—*Held*, that the question was proper as affecting Townsend's credibility, he having testified that the road was in good order at that point.

In showing inconsistent statements out of court, the usual form is to ask the precise question put to the principal witness, whose credibility is attacked; but the practice in this respect is to some extent under the control and discretion of the court.

In such an action, a question put to the attendant of the plaintiff, as to how far the plaintiff was able to help herself, and at what point she required assistance to do what was necessary to be done, called for facts, and not mere opinion, and was not objectionable.

The question to the attending physician of the plaintiff, whether she had the venereal disease while under his care,—*Held*, properly excluded.

(Cause was argued February 17th, and decided March 21st, 1871.)

APPEAL from a judgment of the General Term of the Supreme Court in the Seventh district, ordered upon a verdict for the plaintiff found at the Cayuga circuit.

This was an action brought to recover damages the plaintiff claimed to have sustained from injuries through the negligence and carelessness of the defendant, in not keeping its road in a safe and proper condition, and in carelessly and negligently running its cars upon such road. The plaintiff purchased a passenger ticket at Fort Plain for Canandaigua, and while in the cars on her way, the car in which she sat was thrown down an embankment, inflicting serious and incurable injuries upon her. The accident was caused by the breaking of a short rail on a curve, and by the alleged unsound condition of the ties. The jury rendered a verdict for the plaintiff for \$12,000 damages.

Certain exceptions to the admission and exclusion of evidence taken by the defendants, are sufficiently stated in the opinion of the court.

*J. R. Cox*, for appellant.

*H. V. Howland*, for respondent.

CHURCH, Ch. J. Several exceptions were taken upon the trial, and are presented to this court for review.

The witness Townsend, who was the trackmaster of the defendants, had given evidence in relation to repairs which he had made at the point of, and immediately adjacent to, the place of the accident, and tending to establish that the track was in good condition. On cross-examination, he was asked, in various forms, if he did not state, in the presence of different individuals, in substance, that he was not to blame for the accident, and that he could not get ties or material to fix it; to which the witness answered, that he had no recollection of any such conversation.

The plaintiff then called one of the persons referred to, and put to him the following question:

"Will you state what you heard Townsend say, on Sunday morning, about the track, and about his application for materials to put it in order, and what was said to him that drew him out?"

This was objected to as immaterial, and also on the ground that the precise question should be put to this witness which was put to Townsend. The objection was overruled and an exception taken, and it is claimed that this ruling was error.

We think it was competent to contradict Townsend for the purpose of affecting his credibility, as he had testified to facts somewhat inconsistent with the statement proposed to be proved. He had testified, substantially, that the road was in good order at the place of the accident, and the statement implied, at least, that it was not in good order in consequence of the failure of the company to furnish materials. This precise point was decided in *Wheeler v. The same defendants* (not reported), in an action for an injury occurring at this accident. It was competent only as impeaching evidence, and the court so instructed the jury in the charge.

The objection as to the form of the question involves a point not very definitely settled. It is competent, for the purpose of impeachment, to prove that a witness has made statements out of court in conflict with his evidence in court upon a material question in the case.

To lay the foundation for contradiction, it is necessary to ask the witness specifically whether he has made such statements; and the usual and most accurate mode of examining the contradicting witness, is to ask the precise question put to the principal witness. Otherwise, hearsay evidence, not strictly contradictory, might be introduced, to the injury of the parties, and in violation of legal rules. But the practice upon this subject must be, to some extent, under the control and discretion of the court. It is important that the jury should understand that such evidence is collateral, and not evidence in chief; and the witness sought thus to be impeached should have an opportunity of making explanation, in order that it may be seen whether there is a serious conflict, or only a mis-

understanding or misapprehension; and for the purpose of eliciting the real truth, the court may vary the strict course of examination.

In this case, the question, although not the precise one put to the principal witness, did direct the attention of the impeaching witness to the time and place and subject, and the answer was substantially a contradiction of the statement of the principal witness.

There was no substantial error committed in the form of the question, and no injury could have resulted from the evidence given.

The question put to the female attendant, how far the plaintiff helped herself, and at what point she required assistance to do what was necessary to be done, called for facts, and not mere opinion, and was not objectionable.

It is also objected that the physician's bill was not proved by legal evidence. When the attending physician was on the stand, he was asked by the defendant's counsel the amount of his bill against the plaintiff, to which he answered that he could not tell, that his partner attended to that. The partner was called and proved the amount of the bill under objection, which is claimed to be error. The evidence upon this point was not as full and explicit as is desirable, but it might be inferred from the evidence of both witnesses that the partner kept the accounts, making such charges as the attending physician directed, and that the charges thus directed amounted to the sum named. Some evidence was also given of the time during which the physician attended the plaintiff, and something also of the nature of his services, from which it might be inferred that the bill, \$266.50, was not extravagant. I do not think there was any substantial error committed in this respect, and if there had been, we should not feel justified in reversing the judgment and ordering a new trial, if the plaintiff consented to deduct the amount from the judgment.

The only remaining point urged by the defendants' counsel was the decision of the court sustaining the objection to the



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question to Dr. Rice, whether the plaintiff had the venereal disease while under his care as a physician. We think this was privileged under the statute. The question did not in terms ask for any communication from the plaintiff, but it was an inquiry as to the existence of a disease which the plaintiff had while under the care of the witness as a physician.

The presumption is, from the question, that he learned it as a physician for the purpose of prescribing. The question itself implies it. To require the plaintiff to make the preliminary inquiry whether he learned the fact for the purpose of prescribing would in effect, if the fact existed, have deprived the plaintiff of the protection of the statute. It would have proved the fact indirectly, which might be as injurious as if proved legitimately. The case does not disclose whether the evidence was excluded under the statute, or on account of its remoteness; but that it was properly excluded there is no doubt.

The case was fairly submitted to the jury on the facts, and as there was no error in law committed, the judgment must be affirmed.

All concur except PECKHAM and ANDREWS, JJ., not voting.  
Judgment affirmed.

LAURA REQUA, as administratrix, etc., Respondent v. THE  
CITY OF ROCHESTER, Appellant.

A municipal charter provided, that "whenever any street or alley shall have been opened to, or used as such by, the public, for the period of five years, the same shall thereby become a street or alley for all purposes." *Ipsa facto*, by this enactment, as an acceptance, an alley so used, which had been open to the public use for over twenty years and the private right in it given to the public, became one of the public ways of the city. No formal act of acceptance, other than the acceptance of this charter containing such section, was needed.

An excavation was made in a street, by the authorities of the city of Rochester, so as to cause an abrupt descent from a public alley to the street, and render egress from the alley inconvenient, and not free from danger.—*Held*, that the city was bound to remedy this evil. The power conferred upon them to superintend the streets, imposed a duty to exercise the power in necessary cases.

If, in such case, the excavation has been bridged by a volunteer, and the  
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city allows the bridge to remain there for years, it makes it its own and must keep it in repair.

Where the injury to the plaintiff at the bridge was caused by the removal of planks from it, by unknown persons,—*Held*, in his action against the city to recover for such injuries, that no actual notice to the city of the defect was necessary, when ample time had elapsed after the removal, to render it notorious.

Sufficient time, however, must elapse in such cases, to give constructive notice to the authorities, or they must have actual notice.

A general exception to all the charge so far as it did not conform to several written requests previously handed up is unavailing.

(Argued February 16, 1871, and decided March 21, 1871.)

APPEAL from the judgment of the late General Term of the Supreme Court, in the Seventh district, ordered upon a verdict for the plaintiff, at the Monroe circuit.

This was an action to recover damages for the negligence of the defendant, in permitting a bridge to continue out of repair. The bridge was situated opposite the head of an alley which led into Clark street, in Rochester, and was within the line of the street. This alley was in a thickly-populated part of the city, and was several feet higher than the street, and gradually sloped down to it; a gutter was formed in Clark street, by cutting down abruptly the ground near the intersection of the alley with the street, which gutter was covered by the bridge in question. The plaintiff drove along the alley, and in crossing the bridge, one of the wheels of his wagon went down into an opening in the bridge, caused by the removal of a plank or planks, and he was thrown to the ground, and sustained severe injuries.

The bridge was not built by the city authorities, but placed there by some volunteer, some years before the accident. It did not appear by whom the missing plank had been removed, but that it had been gone two or three weeks.

The circumstances as to the dedication of the alley are sufficiently stated in the opinion.

The jury rendered a verdict for the plaintiff for \$500.

*E. A. Raymond*, for the appellant. Having a discretionary power as to improvements in public streets, the city is not

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liable for injuries incident to the exercise of such discretion. (*Matter of Furman street*, 17 Wend., 649; *Graves v. Otis*, 2 Hill, 466; *Wilson v. Mayor of New York*, 1 Denio, 595; *Radcliff v. Mayor of Brooklyn*, 4 N. Y., 195; *Waddell v. Mayor of New York*, 8 Barb., 95; *Smith v. Corporation of Washington*, 20 How. U. S., 135; *Fish v. Mayor of Rochester*, 6 Paige, 268.) That knowledge or notice to one alderman was not notice to the corporation. (*Fulton Bank v. N. Y. & S. Canal Co.*, 4 Paige, 127; *Farnell Foundry v. Dart*, 26 Conn., 376; *Olcott v. Tioga R. R. Co.*, 27 N. Y., 546; *Bank v. Davis*, 2 Hill, 461, 463.)

*George E. Ripsom*, for the respondent.

FOLGER, J. We have no difficulty in holding, with the learned judge who presided at the circuit, that no such state of facts had been shown, when the plaintiff rested, as would warrant him in taking from the jury, and disposing as a question of law, of the defendant's proposition that contributory negligence was imputable to the plaintiff. The only circumstance which would at all have justified that course was, that the plaintiff had been shown to have imperfect eyesight. But it was not so imperfect but that he could and did drive through other streets of the city, with a reasonable assurance of safety. He was, then, within the rule laid down in *Davenport v. Ruokman* (37 N. Y., 568).

We are of the opinion, too, that the alley in question was a public alley, and that the city was so far bound to keep it in repair as that access to Clark street from it should not be dangerous to the individual. The proof was ample that more than twenty years before this accident, originated a dedication of this alley to the public, and that it was opened to the public use, and was in fact used by the public.

All exclusive private right in it was offered to the public. It was a public alley by dedication, except so far as that there was no formal act of acceptance of it by the public authorities, and it may be, not enough to show a clear intent on the part of

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the authorities to accept and enjoy, as such, the easement proposed to be dedicated. (See *Holdane v. Trustee, etc.*, 21 N. Y., 474; *Bissell v. N. Y. Central R. R.*, 23 id., 64.) But the inchoate dedication had never been rescinded.

In this state of things, the amended charter of the defendants, given and accepted in 1861, came in. By its 156th section it is provided that "whenever any street, alley or lane shall have been opened to or used as such by the public for the period of five years, the same shall thereby become a street, alley or lane for all purposes, and the said common council shall have the same authority and jurisdiction over, and right and interest in the same, as they have by law over the streets, alleys or lanes laid out by it." It is evident that this section was designed to cover the case of just such an alley as this; an alley which had been opened to the public, or used by it, for five years, though the public authorities had not with definiteness indicated an extension of authority and jurisdiction over it.

As this alley had been open to the public use for over twenty years, surrendered by the owners of the fee, the private right in it as property given to the public, and so far, gone from the individual, it came within the operation of this section, and *ipso facto*, by the enactment and acceptance of this amended charter, this alley, as early as 1861, became one of the public ways of the city. No formal act of acceptance other than the acceptance of this charter with this section in it, was needed.

We have been referred to *McMannis v. Butler* (49 Barb., 179). We do not conflict with the decision in that case, in holding that section 156 makes this alley, for the purposes of this case, a public way. That decision holds that this section cannot retroact so as to affect private vested rights. There is no such question before us. All exclusive private rights in this alley have ceased. For more than twenty years it had been marked out and proffered for public use, and been more or less used by the public; so that by the provisions of the act of 1861 this alley was, in 1864, the property of the city

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for public use, and in its care and custody, without contravening any exclusive private or vested right. It may well be, that section 156 cannot have a retroactive effect, so as to operate adversely upon private vested rights. But where public rights alone are concerned, where the private right to the fee has been surrendered by dedication to the public, where general use has, for more than twenty years, recognized and adopted the gift, though no act of the public authorities has formally accepted the donation, this section does move, instead of such act of formal acceptance, and does by its force, declare and make the street, alley, or lane, the property of the city, in trust for the public. The section comes in place of the usual formal act of acceptance by the public authorities, to receive and adopt for legalized public use, and place under public care and control, that which has been by the private owner devoted to the public. It may not affect a private right, if such exists, but it may make good a gift thereof.

The city had then, before this accident, taken control of this alley, and of Clark street into which it ran. The city was then under the duty not only of not interrupting or making unsafe the passage of the citizen from this alley into this street, but was bound so to shape any improvement of Clark street, as that people could continue to use the alley. By the charter of the defendant, its common council were the commissioners of highways for the city, and as such, had the care and superintendence of the streets and alleys therein, and were charged with the duty of their preservation and repair. (Laws of 1861, p. 317, § 155.)

They were the agents of the city, and through them the city was bound to exert the power conferred, so that no harm should come to the individual. (*Conrad v. Village of Ithaca*, 16 N. Y., 158, and note.)

And though there may have been nothing in the condition of the alley itself calling for the action of the common council, or which, neglected by it, would render the city liable, it is certain that, having assumed the active control of Clark street, and by grading and excavation upon it, by cutting

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Opinion of the Court, per FOLGER, J.

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down at the mouth of this alley so as to make an abrupt descent, having rendered the egress from the alley on to that street so far inconvenient as to be not free from danger, the city was bound to amend that evil. This was not a matter of discretion; the power given was not merely permissive. The power conferred imposed, a duty to exercise the power, in a case of need. This would be so, were not the language of the charter mandatory. (*Hutson v. The Mayor, etc.*, 5 Seld., 163; Laws of 1861, p. 291, § 84; id., p. 317, § 155.) Besides, it was something which was created by the act of the city, in the grading down of Clark street; so that the alley, being also under its care, the duty of remedying the immediate consequence of its act was incumbent upon it. The readiest remedy, perhaps, was a bridge over the gutter at the edge of the sidewalk. Though there is not positive proof to that effect, there is testimony from which the jury might have inferred that this method was adopted and the bridge put there by the city. If so, it was, beyond doubt, bound to keep it in repair, and was liable for an injury resulting from a neglect to do so. But if a volunteer instead of the city had, seeing the need of it, put the bridge there; after it was placed there, and by the city allowed to remain for years, did it not adopt it and make it its own? Permitting it to remain, as a usual and suitable means of overcoming the difficulty it had caused, did it not invite the citizen to use it, and did not the city thus come under the duty that he should use it with safety? In our judgment it did. (*State v. Crompton*, 2 N. H., 513; Angell on Highways, § 257; *Heacock v. Sherman*, 14 Wend., 58; *Dygert v. Schenck*, 23 id., 446, 449-451.) So the bridge, whether originally placed there by the corporate authority, or by one volunteering to do that which that authority ought to have done, became the property of the city. In the first instance, plainly enough. In the second instance, by acquiescence in its being laid there, by adopting it, by receiving it as a gift, in kind as it would take and accept a street by dedication of the owner of the land. And in the one case as in the other, being

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bound after acceptance to keep it in condition for safe passage over it. (*Batty v. Duxbury*, 24 Vt., 155; Angell on Highways, § 267.)

The defect in this bridge, through which the plaintiff received his injury, was not one resulting from the wear and tear of ordinary use, or from natural decay. It seems to have been the removal of one or two planks from it by the willful act of some person unknown. The point was made on this state of facts, that the city was not liable for any resulting injury to an individual, unless there was shown to have been express notice to the city of the existence of the defect. We cannot so hold. It has been held in this court. (*Griffin v. The Mayor*, 5 Seld., 456), that where injury occurred to an individual, in a street of a municipality, by the placing in it, by persons not in municipal employment, of obstructions, in violation of an ordinance forbidding such act, that the corporation was not liable when notice of such obstruction was not shown to have been received by its officers. A distinction seems to have been taken between the case of a street out of repair by the act of a third party, and an obstruction placed in the street by such party in violation of an ordinance. For *Hutson v. The Mayor, etc. (supra)*, was cited with approval, which was a case where an excavation had been made in a public street by a third party, and the defendants had neglected to have it filled again. It is true that such excavation had been begun with the assent of the defendant, and so it may have been considered that knowledge of the excavation in the defendant could be presumed, or that there was a duty on it to watch what was done by its assent, so that it should not be left unfinished and dangerous.

We should not hold that a municipal corporation is liable for an injury resulting from a defect in a public way, when such defect is from the willful act of some person without authority, and the injury has followed close upon the unauthorized act. But if between the doing of the willful act, and the befalling of the injury, there has elapsed such length of time as that the defect in the way has become known and notori-

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ous, and there has been full opportunity for the municipality, through its agents charged with that duty, to learn the existence of the defect, we are of the opinion that it is as much the neglect of the municipality not to have amended the defective way, as though the way had fallen from repair by ordinary wear and tear, or other natural cause. Should there be a violent rainstorm in the night-time, and by the choking of sewers, theretofore and under reasonably anticipated circumstances sufficient to carry off the fallen water, a torrent be turned across a street, and it washed out, to such state as that injury occurred to some one abroad on his travel, before the working hours had come again in which the damage could be repaired or warned against, we should not hold a municipality liable for that injury. (*State v. Freyburg*, 3 Shepley, 405; and see *The People v. H. & C. T. R. Co.*, 23 Wend., 254.)

But just as it would be liable for an injury happening thus, after a reasonable time had elapsed, in which it could be presumed to have become aware of the peril in its public streets, so in our view, it is liable, if after the willful act of one not in its employment has made a place of danger in its highway, a lapse of time has run long enough in the sound judgment of a tribunal, for it to have learned of the danger, and to have removed it. (*Reed v. Northfield*, 13 Pick., 94-98.) Express notice of the existence of the nuisance may be brought home to it; or if the defect be so notorious as to be observable by all, this comes in the place of express notice. (*Mayor, etc., v. Sheffield*, 4 Wall., 189, 195, 196.)

In looking into the facts in this case, it is plain to us, that the defect in this bridge had existed for some days before the accident, and was known to many of the inhabitants of the city. The jury have found that the existence of it, had been communicated to one of the members of the common council. Though this would not, under all circumstances, be proof of an express notice to the city of the defect in the bridge, it was proof of the notoriety of it.



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We think that there is sufficient to bring the case within the alternative above put, and that it was so notorious, as to be observable by all.

We are therefore of the opinion, that the judgment in this action must be affirmed, unless the appellant has shown us such errors occurring on the trial, as demand its reversal.

The resolution of the common council, proven from the minutes of the proceedings of that body, were properly received in evidence. They were the official acts of the very agents of the defendant who had the care of this alley and of the streets with which it connected. And they were acts in relation to one of those streets, recognizing its existence, its public use, adopting it as a street, and ordering the very work which caused the need of this bridge, and was the remote cause of the accident.

At the close of the proofs, the defendant's counsel submitted to the court, ten propositions on which he requested the court to charge the jury. They were in writing, and submitted before the charge was made. Without refusal to conform to the requests made, the court proceeded in its charge to the jury. Some of these propositions were substantially adopted by the learned judge. At the close of the charge, the defendant's counsel excepted to it in all the particulars specified in those written requests, "so far as the judge had not charged as requested." Such an exception is of no avail. It does not point out in what the counsel conceives, that the court has erred. It gives no aid for the correction of any error, into which a judge has fallen. (*Walsh v. Kelly*, 40 N. Y., 556.)

The exceptions specifically taken to the charge, and relied upon here, are all answered by the views of the case which we have above expressed.

The exception "to each and every proposition in the second charge of the court to the jury," was too general in form. It did not specify and point out to the court in what it was deemed by counsel to have erred. Here is a charge of nearly eight printed folios, of several propositions, some of which

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are clearly correct, and are not questioned by counsel on argument in this court. But by his general exception he left it to the judge to review what he had said to the jury, and without specific indication to discover in what there was error. Such a mode of trying a cause is not just to the court or to the parties, or to abstract right, and it is a salutary rule which declares that an exception thus taken will not be considered in a court of review. (*Walsh v. Kelly, supra*, and cases there cited.)

There may be instances in which its application will be harsh. But in general, it is beneficent. We feel the less hesitation in applying it in this case, because, though the charge in one particular may be open to criticism, it was, in other respects, more favorable to the defendant than could have been demanded, and because we are convinced that the law and the facts of the case sustain the general verdict of the jury.

The judgment of the court below must be affirmed, with costs to the respondent.

All concur, except ALLEN and ANDREWS, JJ., who, not having heard the argument, took no part.

Judgment affirmed, with costs to the respondent.

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JESSE C. ROWAN and another, Respondents, v. THADDEUS HYATT, Appellant.

Where the defendant, owning a city lot, had authorized C., a broker, to receive and communicate to him proposals for the sale of it, and C. had assumed to sell the property to the plaintiff, and sign a binding contract of sale,—*Held*, that it was essential to the validity of any alleged ratification of such sale, by letters of the defendant to the plaintiff, that they must have been written with full knowledge on the part of the defendant not only of the contract the agent had made, but also substantially how it was made.

(Argued February 20; decided March 21, 1871.)

APPEAL from a judgment of the General Term of the Supreme Court in the second district, affirming the judgment

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for the plaintiff entered on the verdict of a jury at the Kings circuit.

This is an action brought to recover damages for the breach of a contract for the conveyance of real estate. The defendant was the owner of the property, and his brother transacted his business, under a full power of attorney. His brother left the property with Cornell, a broker. The defendant, at an interview with Cornell, refused to name a price for the property, but told the broker that, if he had an offer, to communicate with him. He subsequently wrote to Cornell, naming a price at an average of \$400 per lot. He went to Europe shortly after the interview. Cornell entered into a contract, under seal, in Hyatt's name, with the plaintiffs, to sell them the whole property, at the rate of \$400 per lot. Cornell wrote communicating this to the defendant, who never received the letter. He then saw one Case, who knew defendant's address, and several letters passed between Case and the defendant, by which the latter was apprised that the lots were sold, and of the price, but no mention was made of any contract or any binding obligation having been entered into. The letters of the defendant indicated that he was satisfied with the price named; but, when he finally learned that the broker had assumed to sign a contract for him, he at once repudiated the transaction. He had not before understood that a contract had been made.

The court denied two several motions for a nonsuit. The court charged the jury that Cornell had no original authority to make the contract, and that any binding force it might have come from some act on the part of the defendant, ratifying it. The court finally left it to the jury to decide, from the letters and evidence, whether the defendant, knowing that the sale had been made, and that the contract had been executed, assented to it, and thereby ratified it.

*Ambrose Monell*, for the appellant. The law never imposes a penalty on a party who, in ignorance of the real facts, acts in a manner consistent with his imperfect knowledge.

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This is especially true where unauthorized acts of an agent are sought to be made obligatory on a principal, from his supposed subsequent ratification. (*Nixon v. Palmer*, 4 Seld., 401; *Seymour v. Wyckoff*, 6 Seld., 224; Story on Agency, § 243; *Owing v. Hull*, 9 Peters, 629; *Roach v. Coe*, 1 E. D. Smith, 175; *Billings v. Morrow*, 7 California, 171; *Dupont v. Wertheman*, 10 California, 354; *Matthews v. Hamilton*, 23 Ill., 470; *Brass v. Worth*, 40 Barb., 648; *Smith v. Tracy*, 36 N. Y., 86.) A broker is empowered not to treat, but to explain the intentions of both parties. (*Allan v. Aguirre*, 5 N. Y. Leg. Obs., 380; see 3 Seld., 543; Russell on Factors, 4.) Parties are bound to know the extent of a broker's authority. (*Baring v. Corrie*, 2 B. & Ald., 148, 149; *Baxter v. Duren*, 29 Maine, 439; *Whitehouse v. Moore*, 13 Abb., 142; *Barnard v. Monnot*, 34 Barb., 93, 94.) A jury cannot pass upon a question of fact, on which there is no evidence. (*Evans v. Mengel*, 1 Tenn. State, 68; *Smithland v. Hallgate*, 8 Watts, 384, 385, 387; *S. C.*, 6 Watts, 73; *Hannay v. Stewart*, 6 Watts, 487; *Storey v. Beeman*, 15 N. Y., 524.) It is a temptation and encouragement to the jury to err. (*Stouper v. Lotshaw*, 2 Watts, 165; *Moore v. Patterson*, 28 Penn. State, 513.)

*D. P. Barnard*, for the respondents, argued, to ratify an authorized act of an agent, it is sufficient, if the principal, with knowledge of what has been done by such agent, consents to be bound by it, and unequivocally manifests such intention to the other party. (*Keeler v. Salisbury*, 33 N. Y., 658.) A subsequent ratification by the principal of the previous unauthorized acts of an agent, or of one assuming to be such, is in all respects equivalent to an original authority. (*Com. Bank of Buffalo v. Warren*, 15 N. Y., 577.) Paying commissions to a broker, is strong evidence of ratification, as also of original authority to make the sale.

PECKHAM, J. After a careful examination of the testimony, I am unable to find any evidence that the defendant ever made

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this alleged contract to sell; that he ever gave any authority to the broker to sell; or that he assented to or ratified the sale after he knew it was made. It is not pretended that there is any oral evidence that he gave such assent; nor is it pretended that he gave to the broker, Cornell, any power to sell, or to make a contract of sale. He only authorized him to receive proposals, and communicate them. The question then, is reduced to the letters of the defendant, introduced by the plaintiff.

The letters do not show that he was aware, until the last of the correspondence, that the broker had assumed to do more than he was authorized, or certainly not that he had assumed, in writing, to sell, and to sign Hyatt's name to a contract of sale; the purchaser also signing the same. As soon as a copy of the contract is sent to him, he repudiates it. Until about that time, Hyatt evidently supposed that the alleged purchaser was not bound by what had been done; that he might consummate the proposed purchase, or not, as his interest might dictate. In view of the facts before stated, there is not evidence in the letters (prior to the last one, of the 14th of December), that Hyatt, with knowledge of a written contract, signed by the broker in Hyatt's name, or by the purchaser, had ratified or sanctioned it. It is essential that a party should know what contract has been made, and, in a case of this sort, substantially how it was made, before his statement or letter can ratify or affirm it.

The correspondence in this case, prior to the last letter, in my opinion does not show such knowledge; therefore, the trial court erred in refusing to nonsuit. Judgment reversed, and new trial granted; costs to abide the event.

All concur, except FOLGER and ANDREWS, JJ., not voting. Judgment reversed; new trial granted.

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S. WHITE ALLIS, Appellant v. JAMES READ, HENRY J. GARDNER and S. PARKMAN DEXTER, Respondents.

Money paid upon a contract for the sale of goods, invalid under the statute of frauds, cannot be recovered back from a vendor who is ready to perform on his part.

And where the vendor has subsequently sold and delivered the goods to a third person, at the request of the purchaser, this, if not sufficient to constitute an acceptance and receipt of the property by such purchaser, will certainly preclude him from using the act of sale and delivery as a rescission by the vendor and the foundation of an action to recover back money paid by him to the vendor, on the original void purchase.

Where the plaintiff agreed verbally with the defendants, for the purchase of a quantity of cloths, no portion of the purchase money being then paid, or goods delivered; but, subsequently, when by the first arrangement a payment became due, the parties again met, and upon further negotiations and agreements, varying somewhat the original void contract, the plaintiff delivered to the defendants, one F.'s promissory note, which was to be collected and applied by them on the purchase price of the cloths, and he also consigned to them certain other merchandise, which they were to sell, and also apply the avails, after deducting their commissions, to the purchase price of the cloths,—*Held*, that the minds of the parties must be deemed to have then met upon all the terms and conditions of the agreement, for the sale of the cloths, and that it then became by the plaintiff's transfer of the note and consignments of merchandise, a valid and binding contract, under the statute.

*Bissell v. Balcom* (39 N. Y., 284) commented upon.

(Argued February 24, and decided March 21, 1871.)

APPEAL from the judgment of the General Term of the New York Common Pleas, affirming a judgment for the defendants upon the report of the referee, for \$3,260.05.

The action was brought to recover back moneys and the avails of goods and merchandise, paid by the plaintiff to the defendants, upon a certain contract for the sale of "kerseys," alleged to be void under the statute of frauds. The answer, among other things, sets up a counter claim for the balance of the purchase price of the "kerseys" unpaid.

It appeared that on the 25th February, 1863, and on the 2d and 14th of March following, the plaintiff bought of the defendants, three bills of "sky blue kerseys," for the following

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sums, \$9,554.69, \$32,867.19 and \$893.75. These purchases were by parol, the bills were not signed and no money was then paid or goods delivered. On March 13th and 14th, the plaintiff paid to the defendants on account of the second bill of kerseys, \$1,300, \$1,200 and \$1,000.

On the 2d of April, 1863, the plaintiff delivered to the defendants to be collected and applied in part payment of the second bill of kerseys a note made by one Frisbie, for \$2,000, which note the defendants collected on the 24th of April, 1863, and realized therefrom \$1,995. On the same 2d of April the plaintiff consigned to the defendants for sale, nine cases of cassimeres, upon the agreement that the proceeds of their sale should be received by the defendants in lieu of cash due that day on account of the said second bill of kerseys, and that the defendants should be allowed the usual commission for selling and guarantying payment of the cassimeres. The defendants in June, 1863, sold the cassimeres, and realized over and above commissions, the sum of \$3,565.78. On the same 2d of April the plaintiff consigned to the defendants certain sheetings for sale to apply the net proceeds to payment of the first and second bill of kerseys, which net proceeds were \$303.72.

The referee finds in addition to the above facts that: "On or about the 2d of April, 1863, the defendants at the request of the said plaintiff accepted his draft on them for the sum of \$9,200, dated April 2d, 1863, and payable six months after the date thereof, and at the maturity of said draft the defendants paid the same and the full amount thereof, and in consideration of said acceptance, the said plaintiff, among other things, promised to consign to the defendants for sale, a bill of goods bought by the plaintiff of W. C. Langley on the 27th of January, 1863. It was further then and there agreed between the plaintiff and the defendants, among other things, that the proceeds of said goods when sold by the defendants, after deducting the usual commission and guaranty, should be applied to reimburse the defendants the amount of said draft so as aforesaid accepted by them, and that the surplus, if any,

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should be applied in further payment of the moneys due to the defendants from the plaintiff for the kerseys bought by the plaintiff from them and hereinbefore mentioned. The agreements before mentioned, on the said 2d day of April, (as to the Frisbie note and consignments), were made at the same time, and were part and parcel of the arrangement and agreement, in this finding of fact, first described and set forth."

"It was further then and there agreed between the plaintiff and the defendants that they should sell for and on account of the plaintiff, all the goods then in the hands of the defendants which the plaintiff had bought of them, and had consigned to them, including three cases of satinets, which the plaintiff had bought of the defendants on the 28th of January, 1863, and that the defendants should be allowed a commission of six per cent for making said sales and for guarantying the sales, and a further commission of one per cent for charges; but it was not then agreed at what time, or in what contingency the defendants should make said sales. The plaintiff thereupon, under the aforesaid arrangement, consigned to the defendants for sale, the said goods which the plaintiff had, as aforesaid, bought of W. C. Langley."

"Afterwards, and in October, 1863, the defendants were authorized and employed by the plaintiff, to sell for and on account of the latter, all the kerseys mentioned in these bills upon commission and guarantee, at not less than one dollar per yard, and the defendants accordingly, sold the same, a small part thereof at one dollar per yard, and the residue thereof, on or about the 14th of December, 1863, at one dollar and five cents per yard, and delivered the said kerseys to the said purchasers thereof. On or about the 11th and 30th days of December, 1863, the defendants sold the said three cases of satinets for the best price they could obtain therefor, and delivered the same to the purchasers thereof, and were authorized by the plaintiff so to do."

"On or about the 28th of January, A.D. 1863, the plaintiff made, indorsed and delivered to these defendants his cer-



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tain promissory note, in writing, dated New York, January 28th, 1863, whereby the plaintiff promised to pay, six months after the date thereof, to the order of himself, \$1,756.57, for value received. That said note was past due and payable when this suit was commenced; and the plaintiff has not paid the same or any part thereof, and the defendants are the lawful owners and holders of said note."

"After allowing to the plaintiff all the credits to which he is entitled on the several transactions hereinbefore set forth, and after charging him with interest on the debits, and allowing interest on the credits; the plaintiff on the 31st of December, 1863, was justly indebted to the defendants by reason of the premises hereinbefore stated, in the sum of \$2,840.32, and the plaintiff since then has been and still is indebted to the defendants in said last sum, with interest thereon from last said date to the present time, and which said principal, sum and interest amount together, at the date of this report, to the sum of \$3,260.05."

"The plaintiff before this suit was commenced, and after the defendants had sold and delivered all the goods, as is in the several findings of fact stated and set forth, demanded of the defendants payment of the said sums and items in plaintiff's complaint mentioned and described, and the defendants refused to pay the same, or either of them, or any thereof."

The plaintiff's claim was for the said moneys paid by him, and the net avails of his consignments to the defendants, as follows: \$1,300 and interest, from March 13th, 1863; \$1,200 and interest, from March 15th, 1863; \$1,000 and interest, from April 7th, 1863; \$1,995 and interest, from April 24th, 1863; \$3,565.78 and interest, from June 30th, 1863; \$303.72 and interest, from August 18th, 1863.

*John H. Reynolds*, for the appellant, that payment made on a contract, void by the statute of frauds, where the vendor rescinds or refuses to perform, can be recovered back, cited *Gillet v. Maynard* (5 Johns. R., 85); *Fancher v. Goodman* (29 Barb., 315); *Main v. King* (8 Barb., 535); *Utter v. Stuart*

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(30 Barb., 20). That a subsequent payment on account of a contract, void by the statute, cannot render such contract valid, he cited *Allen v. Aguire* (5 L. O., 380); *Bissell v. Balcom* (40 Barb., 98). That subsequent sale and delivery of the kerseys, by the defendants, with the consent of the plaintiff, could not operate as an acceptance and receipt of the goods, by the latter, he cited *Brabin v. Hyde* (32 N. Y., 519); *Shindler v. Houston* (1 Comst., 261); *Ely v. Ormsby* (12 Barb., 570).

*Samuel Hand*, for the respondent, cited as to the recovery back of voluntary payments, *Collier v. Coates* (17 Barb., 471); *Abbott v. Draper* (4 Den., 51); *Dowdle v. Camp* (12 Johns., 451); *Clark v. Dutcher* (9 Cow., 674); *Wyman v. Farnsworth* (3 Barb., 369). That the delivery by the defendants to third persons, at the request of the plaintiff, was a valid subsequent acceptance by the latter, which was sufficient to take the case out of the statute, he cited *McKnight v. Dunlop* (1 Seld., 537); *Rodgers v. Phillips* (1 Hand, 40 N. Y., 519, 525); *Waldron v. Romaine* (22 N. Y., 368); *Bushell v. Wheeler* (15 Ad. and Ell. N. S., 442). That a subsequent payment renders the contract valid from the time of payment, he cited *Bissell v. Balcom* (39 N. Y., 275, 283-4); *Thompson v. Alger* (12 Metc., 428); *Sanderson v. Jackson* (2 Bos. and Pul., 238); *Brabin v. Hyde* and *McKnight v. Dunlop*, *supra*.

CHURCH, Ch. J. In any view which may be taken of the validity of the contract for the sale and purchase of the kerseys, the plaintiff is not entitled to recover for moneys paid upon them.

Moneys paid upon a contract invalid by the statute of frauds cannot be recovered back, provided the other party is ready and willing to perform the contract on his part. Such payments are voluntary, when made with a full knowledge of all the facts.

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The law will not imply a promise to refund the money, so long as the vendor is not in default. (*Abbott v. Draper*, 4 Denio, 51; 12 Johns., 451.) It is claimed, however, by the plaintiff, that he is entitled to recover back the payments, on the ground that the vendor sold the property, and thus placed himself in a position where he could not perform the contract on his part. This position cannot be maintained, for the reason that the sale of the property by the defendant, as found by the referee, was made at the request and by the authority of the plaintiff himself. Assuming that such request and authority would not be sufficient to constitute an acceptance and receipt of the property by the plaintiff, so as to take the case out of the statute of frauds, yet it would preclude him from using that act as the foundation of an affirmative action in his own behalf. The sale of the property having been caused by himself, the plaintiff cannot, as between him and the defendant, recover any benefit from it. This would be to make his own act the foundation of a valid claim against the defendant. A party cannot take advantage of his own wrong, nor hold another responsible for an act which he committed himself. It would be contrary to the plainest principles of reason and justice. It is clear, therefore, that the affirmative claim of the plaintiff, to recover back the money paid, cannot be sustained.

The important question is, whether the contract was valid within the statute of frauds, so as to enable the defendants to maintain that part of the judgment in their favor against the plaintiff which was for the balance of the purchase-money.

The object of the statute of frauds, when there is no memorandum in writing, was, to have some act done by the parties independent of mere words. Hence, it provides that a part of the purchase-money must be paid at the time, or a portion of the property accepted and received. It is manifest that these requirements are not a perfect protection against fraud and perjury, or against any of the evils of mere verbal evidence, because, whether a payment is made or not, or whether any part of the property is accepted and received upon the

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contract, often rests in parol, and is liable to many of the abuses which prompted the passage of the act. The terms of the contract are always open to dispute, and often induce conflict of evidence. Yet the statute affords some protection. It requires an act in which both parties must participate. There can be no payment by the buyer without the knowledge and consent of the seller. Nor can there be any delivery without the knowledge and consent of the buyer. The words accept and receive import that the buyer must actually receive, and consent to receive, the property, or a portion of it, under the contract. It is claimed by the defendants that this contract is valid under both branches of the statute, and, by the plaintiff, that it is not valid under either; and neither question is free from difficulty. The court below placed their decision in favor of the validity of the contract upon the sale and delivery of the same by the defendants, at the request and by the authority of the plaintiff, and held that such sale, upon request, constituted an acceptance and receipt of the property by the plaintiff.

But the view I take of this case, under the third exception in the statute, renders it unnecessary to pass upon the question of the sufficiency of the acceptance and receipt.

The statute declares such contracts void if there is no memorandum in writing and no delivery, "unless the buyer shall, *at the time*, pay some part of the purchase-money."

At the time of making the contract for the purchase of the "*kerseys*," the defendants gave to the plaintiff bills of sale, not signed so as to make them written memorandums, within the meaning of the statute, but containing the terms of sale, including the price and time of payment; but nothing was paid at that time. Passing over the payments made during the month of March as of no legal significance, and regarding the contract void by the statute of frauds, it seems that on the 2d day of April, when a payment became due, the parties met and entered into further negotiations and agreements in respect to the sale and disposition of the property. The plaintiff delivered at that time a note to the defendants of

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\$2,000, which was to be collected and applied upon the purchase-price, and consigned other merchandise to them to be sold, and the net avails applied, and agreed that the defendants should sell all the property in their hands for the plaintiff, and have a commission of six per cent for selling and guarantying the sales, and one per cent for charges.

It cannot be doubted that at this time the minds of the parties met upon all the terms and conditions of the agreement for the sale and purchase of the goods, and made definite arrangements for such purchase, varying somewhat the original void contract, especially as to the times of payment, and added to the contract the agreement for the sale of the property by the defendants, and the compensation to be allowed for their services, but adopting the price as before fixed and stipulated as contained in the bills of sale to which the parties assented. The statute must have a reasonable construction and its requirements should not be frittered away, neither should it be made an instrument of fraud, by an arbitrary and technical construction. When this contract was originally made, it was void, but there is nothing in the statute to prevent the parties from making a valid contract afterwards, and adopting a part or the whole of the terms of the void contract. The statute calls for acts, not mere words, and nothing could be more formal or decisive than the acts and negotiations of the parties on the occasion alluded to. There were four independent transactions entered into for the purpose of definitely consummating the sale and purchase of this property. A note of \$2,000 was delivered. Nine cases of cassimeres were consigned by the plaintiff to the defendants, thirteen bales of sheetings were also consigned; a draft drawn by the plaintiff upon and accepted by the defendants, upon a promise to consign other goods which had been purchased of one Langley, and which were afterwards consigned, the net avails of all which were to be applied in payment, upon the purchase price of the property in question. If there was no valid contract before, there was every element of such a contract at that time.

The terms and conditions were fully understood and agreed upon. All the evils which the statute intended to prevent were guarded against. The acts of the parties were numerous, open and unmistakable. It is unnecessary to determine that every void contract may be made valid by a payment subsequent to the time of making it, but I do not hesitate to say, that after a void contract has been made, the parties may make a valid contract, by adopting the terms of the void contract, provided it appears that such terms are understood and assented to, and a payment is made and received upon the contract. It is a valid contract from that time, and the statute is as fully satisfied, as if the contract had been made valid originally by a payment at that time.

In *Thompson v. Alger* (12 Met., 428), the Supreme Court of Massachusetts, held in a case, involving our statute of frauds, that "when the payment was actually made and accepted with the full concurrence of both parties, then the contract takes effect, then a part payment of the purchase money has been made, and then the parties have made a valid contract." With the qualification that it should appear that the parties understood and assented to the terms of the contract at the time of the payment, I see no objection to the adoption of these views.

In *McKnight v. Dunlop* (1 Seld., 537), PAIGE J., said, "If the contract is not in law deemed to be made until the part payment of the purchase money, and the previous invalid oral agreement is merely referred to, to ascertain the terms of subsequent valid contract, the decision \* \* \* may be regarded as sound."

In *Bissell v. Baloom* (39 N. Y., 284), WOODRUFF, J., said with reference to making a valid contract after a void contract had been made: "This may be done by reference thereto, and payment accepted on account thereof may be deemed a reproduction of all those terms and conditions in the minds of the parties, a meeting of those minds in their present mutual assent thereto, and a compliance with the statute by payment and acceptance of part of the price." And

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while it does not appear that the court placed their decision upon this precise proposition, yet it is entitled to some weight in showing the tendency of judicial sentiment. In the case before us, it is sufficient to say that the acts and declarations of the parties on the 2d day of April were ample to constitute a valid contract for the purchase and sale of the property, and that the referee was fully justified in his legal conclusion. The employment of the defendants by the plaintiff afterward to sell the property for him, and the sale in pursuance thereof, completed the execution of the contract by both parties, except as to the unpaid balance of the purchase-money for which in part this judgment was recovered. The judgment must be affirmed with costs.

All the judges concurring except ANDREWS, J., absent.  
Judgment affirmed.

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CYRUS MANVEL, Respondent, v. HENRY HOLDREDGE,  
Appellant.

In consideration of the assignment to him by the plaintiff of an interest in a patent, the defendant bound himself to pay the plaintiff \$1,000 before the end of the next year (1865) "or reassign the patent."—*Held*, the year having elapsed without payment, and the defendant having, a few days thereafter, on the money being demanded, offered to reassign, that no action would lie against him upon his obligation to recover the \$1,000. By its terms, he had the option during the whole year to pay the price, and upon his failure to do so within that time, the plaintiff's only remedy was to compel the reassignment, or in case of refusal, to recover whatever might be its value.

(Argued February 24th, and decided March 21st, 1871.)

APPEAL from a judgment ordered by the General Term of the Supreme Court in the first district, upon a verdict for the plaintiff directed by the judge at the circuit for \$1,099.25, the exceptions having been heard in the first instance by them.

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Statement of case.

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The action was brought to recover the sum of \$1,000 claimed to be due under the following letter or agreement between the parties :

“NEW YORK, *December 14th*, 1864.

“CYRUS MANVEL :

“Dear Sir.—I inclose an assignment of the one-fourth interest in patent No. 29,481, from yourself to me, for your signature. You will be required to affix a five cent stamp, and have a witness to your signature.

“In consideration of this assignment being made to me, I hereby bind myself to pay to you one thousand dollars (\$1,000) before the end of next year, 1865, or to reassign the interest to you.

“H. HOLDREDGE.”

Upon receipt of this letter, the plaintiff executed in due form the assignment inclosed, which was an assignment by him to the plaintiff of an undivided fourth interest in a certain apparatus for compressing gas. The plaintiff received the assignment, but did not, during the year 1865, pay the thousand dollars. On the 4th January, 1866, the plaintiff demanded the money, and it was refused and this action was brought. The defendant, at the time of the demand of the money, offered to reassign the patent, and the plaintiff refused to take it.

The defendant, after his motion to dismiss the complaint had been refused, offered to show that the invention patented was not new or useful, but had previously been known and patented ; that the description in the letters patent was not sufficiently clear to enable an expert person to make the apparatus ; that the invention was worthless and the patent void. These defences were set up in the answer, but the court excluded the proof, and directed a verdict for the plaintiff.

*Samuel Hand* (*E. N. Taft* with him), for the appellant.

*Amasa J. Parker, Jr.*, and *John C. Bushnell*, for the respondent.



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ALLEN, J. The contract of the defendant calls for the payment of \$1,000, within the year 1865, or in default of such payment a reassignment of the patent. There is no time fixed for the performance of the last alternative, and it follows that it must be done on request. Upon a failure to pay the money within the time limited, the plaintiff acquired the right to demand a reassignment of the patent, and if not reassigned he could recover the value of it, and if it was worth more than the sum agreed upon, the defendant would be compelled to pay the value. The plaintiff was not compelled to accept the money after the expiration of the year. During the year, the option was with the defendant, after that, the plaintiff had a right to insist upon the reassignment of the patent.

The defendant offered to reassign the patent, and this was all he was bound to do. The defendant had the whole year in which to pay the money, and his promise was that, if he did not make the payment within the year, he would on request reassign the patent. There was no breach of the contract, and the judgment should be reversed and a new trial granted, costs to abide event.

CHURCH, Ch. J., and FOLGER, RAPALLO and PECKHAM, JJ., concurred.

GROVER, J., was for reversal on the ground of exclusion of evidence as to the validity of the patent. PECKHAM, J., also thought this exclusion erroneous.

ANDREWS, J., took no part.

Judgment reversed.

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WILLIAM MCGARY, Plaintiff in Error, v. THE PEOPLE,  
Defendant in Error.

In indictments for arson, the ownership of the property to which fire is set must be correctly averred, and a variance between the indictment and the proof in that respect is fatal.

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A corporation existing under the laws of this State cannot, in criminal indictments or other legal proceedings, be properly designated by two names. ALLEN, J.

Accordingly, an indictment for arson, charging the building fired to have belonged to the "Phoenix Mills Company," and it appearing on the trial that the true corporate name of the company owning the building was "The Phoenix Mills of Seneca Falls."—*Held*, fatally defective, and further by CHURCH, Ch. J., ALLEN and RAPALLO, JJ., (GROVER, PECKHAM and FOLGER, JJ., *contra*) that proof that the company was generally known in the community by the name used in the indictment did not obviate the defect.

The prisoner was indicted under the statute (2 R. S., 667, § 4) making it felony to set fire to or burn any building erected for the manufacturing of cotton or woolen goods, or both. It was proved upon the trial that the whole frame of the structure fired, designed for a factory, was not up at the time; that the part which had been raised was not entirely enclosed, the floors were not laid, the stairs were not up, and no part of the building ready for occupation or substantially ready for the reception of the machinery.—*Held* (GROVER, PECKHAM and FOLGER, JJ., *contra*), that this was not a building "erected" within the meaning of the statute, and there could be no conviction of the prisoner under the indictment.

(Argued January 20th, and decided March 21st, 1871.)

ERROR to the Supreme Court, at General Term, in the Fourth department, to reverse their affirmance of the conviction of the plaintiff in error, by the Court of Sessions of Seneca county, of the crime of arson in the third degree. The accused was charged, in the first count of the indictment, with setting fire to and burning, at the town of Seneca Falls, "a certain building erected for the manufacturing of woolen goods, there situate, and belonging to the Phoenix Mills Company, a corporation duly organized under the statute of the State of New York as a manufacturing company."

In the second count, the building was described as "a certain warehouse, belonging," etc., describing the owner as in the first count.

Upon the trial, the certificate of incorporation, in April, 1867, under the general laws of the State, of a company for the manufacture of woolen goods and cotton goods and goods partly of woolen and partly of cotton, in the town of Seneca Falls, by the name of "The Phoenix Mills of Seneca Falls,"

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was produced and given in evidence. Evidence was given, under objection, by the president of the corporation, that the company was "generally known in community and in business transactions as the Phoenix Mills Company." On cross-examination he testified that he had heard it called Phoenix Mills Company. "Our company is known as Phoenix Mills. I think at Seneca Falls most frequently called Phoenix Mills." Another witness testified: "This company is generally known by name of Phoenix Mills; I only know what it is called by a few persons; always spoken of as Phoenix Mills and Phoenix Mills Company." On cross-examination he said: "The company is generally spoken of as Phoenix Mills Company; the building as Phoenix Mills No. 1."

Evidence was given tending to prove that the accused set fire to a building in the process of construction by this corporation, on the night of the 14th of September, 1868. The building was not completed, and was but slightly injured by the fire. It was a frame building; the roof was on, and it was sided up at the sides; the two ends were not sided up or inclosed. The windows were not in; the floors were partially laid, but neither of the floors was completed. There were no chimneys.

Ells were to be, and were, during the same year attached to the ends of the building, and constituted a part of the plan of the factory building, and the portion of the ends of the building covered by the ells, were, after the fire, lined or ceiled. In some of the stories, no floor was laid, no stairs had been built. The accused gave evidence tending to show that the building had not progressed as far towards completion as indicated above, and that the roof was not on, and the rafters had not been raised. There was a quantity of lumber in the basement, that had been procured for the making of boxes. At the close of the evidence, on the part of the prosecution, the counsel for the accused, asked for an acquittal, on the ground of variance between the indictment and the evidence, and also that there was no building which was the subject of arson, nor any building erected for the manufacture of woolen goods,

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but that the building was only in the process of construction.

The several grounds were overruled, and the request was denied. The judge, at the close of the trial, charged the jury, that if the building was so far advanced in its construction as to have assumed form and character as a building, and to be properly denominated a building, then it was a building within the statute, and that the purposes for which the building was erected, could be shown, by proving the intention of the proprietors, that if the building was in the condition as represented by the witnesses for the prosecution, it was sufficiently advanced in its construction, to be legally the subject of arson under the statute. He also charged that if the corporation was commonly known in the vicinity, by the name used in the indictment, the variance from the true name was not material, and refused to charge that, if the name of the corporation was "The Phoenix Mills of Seneca Falls," the accused should be acquitted. Proper exceptions were taken to the several rulings and decisions of the court. The accused was convicted, and sentence was pronounced, the proceedings upon which have been stayed.

*Francis Kernan*, for the plaintiff in error, on the question of variance, cited Archbold's Criminal Pleading, p. 79, Marg. p. 265; 7 edn. by Waterman, and notes; *People v. Slater* (5 Hill, 401); 1 Archbold Cr. Pr. and Pldgs., p. 124, Waterman's ed. and notes on p. 402; 2 id., p. 488. On the construction of the statute and whether the structure fired, was a "building erected," he cited *Elsmore v. Hundred of St. Barnards* (8 B. and C., 461); Laws of 1869, chap. 873; *People v. Allen* (5 Den., 79). BEARDSLEY, C. J.

*William C. Hazelton* (district attorney), for the defendant in error, on the variance as to the name of the company, cited 1 Chitt. Cr. Law, 211, 213, 215; 2 Hale, 241, 245; *U. S. v. Kinman* (1 Bald., 292); 1 Archbold, 7 ed., 267; id., note 1, p. 404; Archbold, 3 Am. ed., 31. That there was a "building erected," he cited *Rex v. Stallion* (1 Moody C. C. R.,

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398; 2 Archbold, Waterman ed., p. 716, 717; *Comm. v. Squire* (1 Metc., 258); *Allen v. State* (10 Ohio, 287).

ALLEN, J. The misnomer of the corporation owning the property which was the subject of the arson, was not the result of ignorance of, or inability to learn its true name. It had become incorporated, only about eighteen months before the indictment was found, and the certificate of incorporation was of record in the clerk's office of the county, and accessible to the grand jury and prosecuting officer.

The record evidence of the existence of the corporation, given upon the trial, and then supposed to be necessary in support of the indictment, would, had it been produced before the grand jury, have prevented the mistake, and avoided the very serious and embarrassing question now presented.

It is conceded that the averment of ownership of the property injured was a necessary and substantial part of the indictment, and that without it the indictment would have been defective. It is material, in an indictment at common law for arson, that the ownership of the house should be correctly stated, so as to show it to be the house of another, and an indictment omitting to state whose house it was is not sufficient. (1 Russ. on Crimes, 564.) The allegation as to the ownership of the property cannot be rejected as surplusage, as was properly done in *United States v. Howard* (3 Sumner, 12). Many of the reported cases have turned upon very nice questions as to the ownership of the property the subject of the crime, but all agree that the name of the owner must be correctly stated. The name of the person whose property has been injured is matter of description, and must be proved as laid. (Roscoe's Cr. Ev., 95; *Ib.*, 388.)

No allegation which is descriptive of the identity of that which is essential to the charge in the indictment can be rejected, and the name of the person in whom the property which is the subject of the charge is laid, or on whom the offence is stated to have been committed, must be proved according to the indictment. (2 Russ. on Crimes, 788, 789.)

The averment of ownership is connected with the charge and must be proved, and as a general rule the name of the party whose existence is essential to the charge must be proved in conformity to the indictment, and a misnomer is usually fatal. (2 Russ. on Crimes, 795; 1 id., 857; 2 Stark Ev., 65, part 4.)

These general principles are not denied; but another rule was invoked in support of the conviction, by the application of which the accused was convicted at the sessions, to wit, that the owner of the property may be named and described by his true name, or that by which he is generally called and known. A prosecutor may be described by the name he has assumed, or that by which he is generally known, although such names are not the true or baptismal names of the person. An individual can by user assume or acquire a name by which he can contract, and sue and be sued. As in *Rex v. Norton* (R. & R., 510), the prosecutrix had been called and known by the name of Mary Johnson, and by no other name for five years; and in *Att'y Gen'l v. Hawkes* (1 Tyrwhitt, 3), the individual had dropped his middle name of Tyrrell and signed his name Thomas Dabbs, and was known by that name. In these cases, and in the other cases in which the rule has been applied, the new name has been so assumed and used by the individual, or applied to him by the general public, as, if not to have taken the place of the true name, at least to have become equally common as designating and identifying the person intended.

In the cases cited a misnomer could not have been pleaded in abatement in an action for or against the individuals by their new and assumed names. (See *Sull's case*, 2 Leach, 861; *Rex v. Timmins*, 7 C. and P., 499.) Assuming that a corporation may take and have a name other than that by which it is created, the evidence is very slight of any such change of name here. Had the corporation been sued by the name given it in the indictment, a replication to a plea of misnomer in abatement, that it was known as well by one name as the other, would hardly have been sustained by the

evidence. At most the evidence was not conclusive, and should have been submitted to the jury, as in *Reg v. Evans* (8 C. and P., 765), as a question of fact, and not decided by the court as a question of law. But the more important question is whether a corporation created and existing under the laws of this State can, in legal proceedings, be known by two names. That it would have been proper to aver the ownership of the property by the true name is not denied, and if the conviction is sustained, it will follow that the corporation may have two names, by either of which it may be known and called in legal proceedings indifferently. It is well settled that corporations may claim the benefit of contracts, grants, devises and bequests, although not described and named with entire accuracy, and in ascertaining the intent of the contracting parties and testators, evidence is proper to show by what name the corporation was generally known and called by the parties, and this with a view to ascertain the intent. The evidence is given upon the same principle that evidence is given to show in what sense particular terms are used in a will or other instrument. These cases, however, do not aid in resolving the question before us. The only means of identifying a corporation aggregate is by the name. The members are liable to change, and it can only be known by its name. The prosecutor here very properly gave the record evidence of the creation of the corporation, but was forced to explain his own record by parol, and show that another corporation, a corporation under a different name, had taken the place of that originally incorporated. His evidence was not in answer and to avoid the effect of evidence given by the accused, but to get rid of a record put in evidence by himself and necessary to his case. The prosecutor conceded the necessity of proving the identity of the corporation, and as that did not result from the identity of the names he sought to establish it by reputation.

A corporation cannot, except as authorized by law, change its own name, either directly or by user. (*Queen v. Registrar*, 10 Q. B., 839.) It cannot do such an act for itself. Neither

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can the public give it a name other than that of its creation, that is, a name by which it can be recognized in judicial proceedings.

A corporation may, very likely, so adopt a name, in the transaction of its business, as to be made liable in its true name upon transactions in its assumed name; but it must then be sued by its true name.

A distinction may exist between an ancient corporation, one existing by prescription, and a modern corporation, one created by charter. It is possible that the former may have a special name by user; but, in this State, we have no corporations save those created by law, and a corporation created within memory can regularly have but one name (Bac. Ab., Corporations, c. 3); and, in all legal proceedings, the true name of the corporation must be used. (*Turvil v. Ainsworth*, 2 Ld. Raym., 1515; *Healing v. Mayor, etc., of London*, Cro. Car., 574.)

A difference is recognized between a misnomer of a corporation in judicial proceedings, and in obligations, grants, etc.; and while in the former it will be fatal, effect may be given to the latter, notwithstanding the misnomer. (Bac. Ab., *supra*; *Rex v. Mayor of Ripon*, Salk., 433; *Rex v. Morris*, 1 Ld. Raym., 337. See, also, 2 Ld. Raym., 1238; *Reg. v. West*, 2 Eng. Railway Cases, 613; *Rex v. Patrick*, 1 Leach Cr. Cas., 287.)

The accused had no opportunity to object to the misnomer upon the trial. He could not plead it in abatement or otherwise; but, upon the traverse of the indictment, the proof of the corporation, as alleged, was upon the prosecution, and the variance was fatal.

There is another difficulty in sustaining the conviction. The indictment is under a statute making it a felony to set fire to or burn "any building erected for the manufacture of cotton or woollen goods or both." (2 R. S., 667, § 4.) The frame of the whole building was not up at the time of the fire, and that part which had been raised was not entirely inclosed; the floors were not laid, the stairs were not up, and no part of it



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was ready for occupation, or substantially ready for the reception of the machinery, or for use and occupation for any purpose. A building so incomplete can scarcely be called a building *erected* for any purpose. The statute was designed to protect buildings of the character named when completed, or substantially completed, whether actually occupied or not. A factory building, actually constructed, was contemplated by the statute, and not the frame of a building; a building partially constructed, and in the process of erection or construction. A "building erected" is quite distinct from a "building being erected." A building is a fabric or edifice constructed for use. To erect, when used in connection with a house, or church, or factory, is to build; and neither can be said to be erected until they are built, completed. A building intended for a house not completed, is not a house within a statute authorizing the recovery of satisfaction for burning a house, etc. (*Elmer v. The Hundred, etc.*, 8 B. & C., 461; and see *State v. McGowan*, 20 Conn., 245.)

We have the sense of the legislature upon the legal interpretation of this statute. By an amendment of the Revised Statutes, in 1869, it is made a crime of a lesser degree than the burning of a completed building to set fire to or burn buildings of this character and description "in the process of erection or construction." (Laws of 1869, ch. 873.) It cannot be that the legislature intended to make the same act arson in different degrees.

The judgment of the Supreme Court and of the Sessions should be reversed; and, as there can be no conviction under this indictment, the prisoner should be discharged.

CHURCH, Ch. J., and RAPALLO, J., concurred in the opinion; ANDREWS, J., concurred in the result on the second ground stated in the opinion; GROVER, PECKHAM, and FOLGER, JJ., dissented.

Judgment of the Supreme Court and of the Sessions reversed, and prisoner discharged.

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Statement of case.

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WILLIAM H. GALVIN, Respondent, v. JAMES H. PRENTICE,  
Appellant.

In an action upon *quantum meruit* for two years' services, performed under an entire contract for a longer period, void by the statute of frauds, the rate of compensation fixed by the agreement during the whole term is not even *prima facie* evidence as to the value of the services rendered, where, at the commencement of the term of service, the plaintiff was ignorant of the business in which he was employed, and ordinary skill therein was only acquired by instruction and practical experience for a considerable time.

Where services are rendered under a contract void by the statute of frauds, no action can be maintained to recover their value, except upon the default of the other party, or his refusal to go on with the contract.  
RAPALLO, J.

*Lockwood v. Barnes* (8 Hill, 28) approved.

(Argued February 9; decided March 21, 1871.)

APPEAL from the judgment of the General Term of the Supreme Court of the second district, affirming a judgment of the City Court of Brooklyn for the plaintiff.

The action was by an amendment of the complaint, permitted by the court, changed from one on special contract to one on *quantum meruit* for the balance due for plaintiff's service for two years.

It appeared that the plaintiff was verbally hired by the defendant, in May, 1866, to work in the latter's hat factory for the term of three years, upon the following terms: He was to have five dollars a week until he had learned to finish hats properly, and then was to have journeyman's wages. Two dollars a week were to be deducted from his wages for instruction, damage to material, and use of bench, called "task" money, and fifty cents a week deducted, called "security" money, to be returned to him at the end of the three years, but to be retained, if he left before the end of the three years or was discharged for good cause.

The plaintiff worked from May, 1866, to April, 1868, and then stopped. The evidence was conflicting as to whether or

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Opinion of the Court, per RAPALLO, J.

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not he was discharged. The deduction of two dollars and fifty cents a week from his wages had been made pretty regularly; and it was for the aggregate of these deductions the action was brought.

The judge charged the jury that, in his view, the discharge had nothing to do with the case; that "it was a void contract, a contract which could not be enforced, which either party had a right to rescind at any time, and therefore it is a mere matter of how much the services are worth. I would state, that whatever amount the jury find they are worth the plaintiff is entitled to. The contract, although void, may be considered *prima facie* evidence of the value of the services."

The defendant excepted to that portion of the charge that the contract might be considered *prima facie* evidence of the value of the services.

*William P. Prentice*, for the appellant, upon the points discussed in the opinion, cited *Erben v. Lorillard* (19 N. Y., 299); *Crawford v. Morrell* (8 Johns., 253); *Thayer v. Rock* (13 Wend., 53); *Duncan v. Blair* (5 Denio, 196); *Baker v. Higgins* (21 N. Y., 398); *Starr v. Litchfield* (40 Barb., 541); *Cunningham v. Jones* (20 N. Y., 486); *McMillan v. Vanderlip* (12 Johns., 165); *Lautz v. Parks* (8 Cow., 63).

*John F. Baker*, for the respondent, upon the same points, cited *Weir v. Hill* (2 Lansing, 281); *Shute v. Dow* (5 Wend., 204); *Nones v. Homer* (2 Hilt., 116); 2 Smith's Lead. Cas., 11; 2 Keyes, 152; 3 Hill, 128; *King v. Brown* (2 id., 128).

RAPALLO, J. That part of the charge of the judge, in which he instructed the jury, that the contract, although void, might be considered *prima facie* evidence of the value of the services, was, under the circumstances of this case, erroneous; and the exception thereto, was well taken.

The contract price of the services, was fixed with reference to a continuous service of three years. It appeared, upon the plaintiff's own showing, that the contract was that he should

work for three years, and be paid the portion of his wages, now in question, only in case he served three years, or was discharged for want of work.

The plaintiff claimed that he had been discharged, but the evidence on that point, was conflicting, and the judge charged the jury, that the discharge had nothing to do with the case. It cannot be assumed, therefore, that the fact of discharge was established.

It appeared that the plaintiff was to learn the business in which he was employed. It cannot be supposed that his work was of the same value during the prior part of the term of his employment, as it would be during the latter part, when his proficiency must naturally have increased. The price agreed upon for the three years, was not, therefore, competent evidence of the value of the services during the first and second years, and the contract being void by the statute, could not be so far enforced as to determine the rate of compensation.

The exception to the ruling on that point, is fatal to the judgment. But it must not be inferred that we agree to the proposition, that if there had been a correct ruling on the question of damages, the plaintiff would have been entitled to recover without proving that he was discharged, or that the defendant was in default.

Where payments are made, or services rendered upon a contract, void by the statute of frauds, and the party receiving the services or payments refuses to go on and complete the performance of the contract, the other party may recover back the amount of such payments, or the value of the services, in an action upon an implied assumpsit.

But to entitle him to maintain such action he must show that the defendant is in default. (*King v. Brown*, 2 Hill, 487.) The rule is very clearly stated in *Lockwood v. Barnes* (3 Hill, 128), as follows: "A party who refuses to go on with an agreement void by the statute of frauds, after having derived a benefit from a part performance, must pay for what he has received."

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Opinion of the Court, per RAPALLO, J.

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So in *Dowdle v. Camp* (12 Johns., 451), *Abbott v. Draper* (4 Denio, 51, 53), and *Collier v. Coates* (17 Barb., 471), it was held that money paid on a parol contract for the purchase of lands, which is void by the statute of frauds, cannot be recovered back unless the vendor refuses to perform; and to the same effect are numerous decisions of the courts of our sister States, referred to in *Collier v. Coates*.

The default of the defendant or his refusal to go on with the contract is recognized as an essential condition of the right to recover for services rendered or money paid under any description of contract void by the statute of frauds. (*Erben v. Lorillard*, 19 N. Y., 304, per DENIO, J., and S. C., 302, per GROVER, J.; *Burlingame v. Burlingame*, 7 Cow., 92; *Kidder v. Hunt*, 1 Pick., 328; *Thompson v. Gould*, 20 Pick., 134; see page 142.)

When the contract is entire, and one party is willing to complete the performance, and is not in default, no promise can be implied on his part to compensate the other party for a part performance.

The express promise appearing upon the plaintiff's own showing, although it cannot be enforced by reason of the statute, excludes any implied promise. (*Whitney v. Sullivan*, 7 Mass., 109; *Jennings v. Camp*, 13 Johns., 96.) *Expressum facit cessare tacitum*. (*Merrill v. Frame*, 4 Taunt., 329; *Allen v. Ford*, 19 Pick., 217.)

The effect of the statute is to prevent either party from enforcing performance of the verbal contract against the other, but not to make a different contract between them.

An implied promise to pay for part performance can arise only when the party sought to be charged has had the benefit of the part performance, and has himself refused to proceed, or otherwise prevented or waived full performance (*Munro v. Butt*, 8 Ell. & Black., 738; *Smith v. Brady*, 17 N. Y., 173; 13 Johns., 94; 8 Cow., 63); or where, after the making of the contract, full performance has been rendered impossible, by death or otherwise, without fault of the contracting party. (*Wolf v. Howes*, 20 N. Y., 197.)

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Statement of case.

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The judgment should be reversed, and a new trial ordered, with costs to abide the event.

PECKHAM and FOLGER, JJ., concurred; GROVER, J., concurred in the result on the ground of error in the charge; Ch. J. did not vote; ALLEN, J., dissented.

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CHARLES ROCKWELL, as Receiver of JAMES E. FARREL, Respondent, v. JOHN G. MERWIN, Appellant.

Where, in an action brought in the New York Superior Court by the plaintiff, as receiver, the complaint merely alleged that he was, by an order of one of the justices of the Supreme Court, "duly" appointed receiver upon the application of a judgment creditor of B., without pleading any judgment or proceeding upon which such appointment was or could be made, — *Held*, that the insertion of the word "duly" authorized proof on the trial of all the facts conferring jurisdiction; and, further, that, upon his appointment as receiver, he had general authority to commence actions, and, having such general power, he could select his tribunal, and was not confined to the court in which he was appointed.

(Argued February 22; decided March 21, 1871.)

APPEAL from a judgment of the General Term of the New York Superior Court, affirming the judgment for the plaintiff entered upon the report of a referee.

This action was brought by the plaintiff as receiver of the property of James E. Farrel, to recover for services performed by said Farrel as superintendent of the Milford hotel.

The complaint, among other things, alleged that, "on the 24th day of April, 1868, at the city of New York, upon an application made by (A, B and C), judgment creditors of James C. Farrel, and by an order then made by Hon. ALBERT CARDOZO, one of the justices of the Supreme Court, the plaintiff was appointed receiver of the property of said James E. Farrel." This was the only allegation in the complaint going to show any appointment of the plaintiff as receiver, or his right to the claim in suit.

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Opinion, PER CURIAM.

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On the trial, after a motion to dismiss the complaint, on the ground that it did not state facts sufficient to constitute a cause of action, had been denied, an application was made to amend the complaint by inserting the word "duly" between the words "was" and "appointed." The motion was granted, and the complaint amended accordingly. Afterward, a judgment against Farrel in the Supreme Court, an execution thereon, and an order of Judge CARDOZO, appointing Charles Rockwell receiver, were admitted in evidence, against the objection of the plaintiff.

*Samuel Hand*, for the appellant, insisted that motion to dismiss the complaint should have been granted, because the complaint did not show plaintiff's right to bring action (*Campbell v. Foster*, 16 How., 275; *Cooper v. Bowles*, 42 Barb., 88; *Gillett, Rec., v. Fairchild*, 4 Denio, 80; Code, § 161; *Hunt v. Dutcher*, 13 How. Pr., 538; *Smith v. Johnson*, 7 How., 39; Code, § 298; *Ball v. Goodenough*, N. Y. Times, August 5, 1870); that it should be brought in the court by which he was appointed. (Code, § 298; *Merritt v. Merritt*, 16 Wend., 405; aff'g *S. C.*, 5 Paige, 525.)

*Abner C. Thomas*, for the respondent, insisted that the complaint was sufficient. (*Stewart v. Beebe*, 28 Barb., 34; *Bangs v. McIntosh*, 23 id., 591; *Dayton v. Connah*, 18 How., 326; Code, § 161). That complaint might have been amended on trial, so as to allege all the facts proved. (*Coleman v. Playstead*, 36 Barb., 27; *Lounsbury v. Purdy*, 18 N. Y., 515; *Pratt v. Hudson River R. R. Co.*, 21 id., 305; Code, §§ 173, 176).

PER CURIAM. The amendment of the complaint cured any defect in it. And the insertion of the word "duly," in the allegation that the plaintiff was appointed receiver, gave him the right to show on the trial all the facts conferring jurisdiction. (Code, § 161.) On the trial he did show facts sufficient to establish that he was regularly, and in due form of law, appointed the receiver of Farrel.

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Opinion, PER CURIAM.

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It was necessary that the order appointing him should be filed and recorded in the office of the clerk of the city and county of New York. It was shown on the argument at General Term, that this had been done before the commencement of this action. And this cured the defect in the proof before the referee. (*Bank of Charleston v. Emeric*, 2 Sandf., 718.)

The point made by the appellant, that the plaintiff did not show that the judge who made the order for the appointment of the plaintiff as receiver was the same officer before whom the supplementary proceedings were initiated, was not taken before the referee. Nor does it appear, inasmuch as there is no copy given in the case of the records given in evidence, that the objection, if taken, had any foundation.

After his appointment as receiver, the plaintiff had general authority, by virtue of the then ninety-second rule of the Supreme Court, by a judge of which he was appointed, to commence a suit. Having general power to sue, he could select his tribunal.

The motion to dismiss the complaint, made at the close of the plaintiff's case, was properly denied. There had been positive and uncontradicted proof of the agreement between Farrel and the defendant, and of the balance due Farrel thereon. And although the account of Farrel's services, etc., was from a partial ledger, it had been submitted to the defendant, and was not objected to by him. It is to be inferred easily from the testimony that all the other books of the hotel were in his control, and subject to his inspection at the time when the account was submitted to him.

The other points made by the appellant are upon questions of fact determined by the referee, and are not reviewable here.

The judgment appealed from should be affirmed, with costs to the respondent.

All the judges concurring,  
Judgment affirmed.



## Statement of case.

SIEGMUND T. MEYER and ASHER T. MEYER, Respondents, v.  
JOHN AMIDON, Appellant.

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An action founded upon the fraud and deceit of the defendant in making false representations, cannot be maintained, in the absence of proof, that he believed, or had reason to believe at the time when he made the representations, that they were false, or that he assumed to have, or intended to convey the impression that he had, actual knowledge of their truth, though conscious that he had no such knowledge.

Where a fact necessary to sustain the conclusion of law does not appear in the findings of fact, and the case shows that upon a request to find as to such fact, there was a refusal to find otherwise than as already found, and the conclusion of law is in terms based only upon the facts expressly found, this court will not presume or infer in aid of the judgment a finding of this fact.

Accordingly, in an action for false and fraudulent representations as to the solvency of a party, the referee found that the representations made by the defendant were false, that the plaintiffs were induced by them to give credit to such party, and that damages ensued therefrom to the plaintiff, and upon the request of the defendant's counsel to find that the statements were made without fraud, and without intent to deceive, he refused to find "otherwise than as contained in his finding of fact," and the conclusion of law was as above stated.—*Held*, that upon the facts found the plaintiff was not entitled to recover, and in view of the refusal to find, the court would not presume the finding by the referee of the necessary fact of intent to deceive or fraud, to sustain his judgment for the plaintiffs.

(Argued February 23d, 1871; decided March 21st, 1871.)

APPEAL from a judgment of the General Term of the first judicial district, affirming a judgment for the plaintiffs entered upon the report of a referee.

This action was brought to recover damages from the defendant for false and fraudulent representations in regard to the solvency of the firm of Blackmer, Walker & Co., whereby the plaintiffs were induced to sell them goods to the amount of \$3,500.

The referee's report contained a finding of facts that the representations made by the defendant were false, and that the plaintiffs were induced to trust the firm in question in consequence of them, and had suffered damages therefrom, and

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Opinion of the Court, per FOLGER, J.

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“upon these facts” found, as a conclusion of law, that the plaintiffs were entitled to recover such damages.

The defendant requested him to find that the representations were made without fraud. The referee refused so to find otherwise than as contained in his findings of fact. The defendant also requested him to find that they were made without intent to deceive, and there was the same refusal.

*George C. Barrett*, for appellant, insisted that the plaintiffs could not recover upon the facts as found by referee. (*Paisley v. Freeman*, 3 T. R., 51; *Haycraft v. Creasey*, 2 East., 92; *Russell v. Clark's Ex'rs.*, 7 Cranch, 69; *Patten v. Gurney*, 17 Mass., 182; *Urn v. Wilcox*, 1 Day, 22; *Hart v. Tallmadge*, 2 Day, 381; *Ewing v. Calhoun*, 7 Vermont, 89; *Weeks v. Burton*, id., 57; *Upton v. Vail*, 6 Johns., 181; *Young v. Lovel*, 8 Johns., 25; *Gallagher v. Brumel*, 6 Cow., 350; *Allen v. Addington*, 7 Wend., 9; S. C., 11 Wend., 374; *Wakeman v. Dalley*, 44 Barb., 501; *Chester v. Comstock*, 6 Robertson, 1; *White v. Merritt*, 3 Seld., 352; *Zabriskie v. Smith*, 3 Kern. 322; *Hubbard v. Briggs*, 31 N. Y., 518; *Marsh v. Falker*, 40 N. Y., 565; *Chester v. Comstock*, 40 N. Y., 575, 576.)

*E. P. Wheeler*, for respondents, cited *Marsh v. Falker* (40 N. Y., 566); *Bennett v. Judson* (21 N. Y., 238); *Smith v. Coe* (29 N. Y., 666); *Carman v. Pultz* (21 N. Y., 547).

FOLGER, J. We have held, in the case of *Oberlander v. Spies and others*,\* decided at the December sitting, that an action founded upon the deceit and fraud of the defendant, cannot be maintained, in the absence of proof, that he believed or had reason to believe, at the time when he made them, that the representations made by him, were false, and that they were, for that reason, fraudulently made.

*Marsh v. Falker* (40 N. Y., 562) should be read in connection, where it was held that the defendant must have known at the time, that the representations were false, or must have

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Opinion of the Court, per FOLGER, J.

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assumed or intended to convey the impression that he had actual knowledge of their truth, though conscious that he had no such knowledge.

The referee in this case finds that the representations made by the defendant were false ; that the plaintiffs were induced by them to give credit to the subject of them ; and that damage ensued therefrom to the plaintiffs. He does not find that the representations were fraudulent, nor that the defendant believed or had reason to believe when he made them, that they were false, nor that he assumed, or intended to convey the impression, that he had actual knowledge of their truth. He does not find that the defendant had any intent to deceive or defraud the plaintiffs. Clearly, these findings of the referee, do not establish a cause of action for the plaintiffs against the defendant, nor sustain his conclusion of law and judgment in their favor. The counsel for the respondent now invokes the aid of a rule, which he states thus ; that a court of review will presume that every fact warranted by the testimony, and necessary to sustain the referee's conclusion of law, was actually found by him, though not expressed in his findings. It must be admitted, that the facts not expressly found by the referee, are of vital importance to the plaintiff's case, and make so large a part of such a cause of action as that to presume that he did find them, though he did not express that he found them, is putting to a severe strain the rule relied upon. And to make that strain more tense, come the refusals to find upon the request of the defendant ; the language of the conclusion of law ; and the statement of the law of the case in the opinion of the referee. The referee was requested to find that the statements were made without fraud, and without intent to deceive. The referee refused so to find otherwise than as contained in his findings of fact. But as his findings of fact are silent upon these two points, are we not bound, from the report, to presume that he did not find at all on those points ? Can we presume after his attention was, with formal particularity, called to these two important points and his judgment demanded upon them, and he has referred to his express findings for his decision

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Opinion of the Court, per FOLGER, J.

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thereon and none is found there, that he did in reality find upon them, as facts established by the testimony in favor of the respondents? In addition to this, his conclusion of law, is based only upon the conclusions of fact which he has reported: "Upon *these facts*, the referee decided," it says. It is a presumption too bold, that as a basis for his judgment, he did make unuttered findings of fact, to the effect that the defendant made the statements fraudulently, and with intent to deceive. It appears to us rather, that the referee conceived the law to be, that it was not needful that there be proof of fraud and intent to deceive, to make false representations actionable, but that the falsity being proven, liability followed without proof of other facts, as an inference from the falsity of the statements. And, referring to the opinion of the referee (for which there is precedent, *Smith v. Coe*, 29 N. Y., 670-1), we find him holding that "the intent may be inferred from the falsity, of the representation, and the consequent loss to the plaintiffs, and that the rule contended for by the defendants counsel is fully satisfied upon showing these facts without requiring further proof." In such case it would be unjust to the defendant, for us to presume that the referee would, if he had held the law to require more facts, have found more facts. And if we do not so presume, we must go through the testimony, and determine from it whether it would have warranted him in such a finding of facts as would sustain his conclusion of law and his judgment for the plaintiffs. This would be to substitute our view of the testimony for his. We do not think that the authorities lead to such a result.

One of the earlier cases on the subject is *Carman v. Pultz* (21 N. Y., 547), where it is held, that this court will presume nothing in favor of the party alleging the error, but if compelled, through the imperfection of the statement of facts, to resort to presumptions at all, will adopt such only as will sustain the judgment; and where there is an evident omission of important facts in the statement or report, must presume those facts to have been such as would warrant the judgment

rendered. The facts as found in that case were enough to sustain the judgment. And it was the appellant who there asked the court to look into the testimony, and discover there a fact which might vitiate the judgment. It is to be noticed also that there the ground of the decision against such cause, is the imperfection of the statement of facts, and the evident omission of important facts in the statement or report. Can it be said that in the case in hand, there is an imperfection of the statement? There is an absence of finding, an omission of facts, important if they existed, for the upholding of the plaintiffs' judgment. It does not appear however, that this was a casual or negligent omission. Rather, it would seem, the referee's attention having been sharply drawn to the point, that the omission was one of design. The next case is that of *Grant v. Morse* (22 N. Y. 323). In that too, the facts as found sustained the judgment, and this court declined to look into the testimony to find facts which would vitiate it. The court said that every intendment not absolutely unreasonable in itself will be against the appellant, that the judgment is presumed to be right unless it appear that a rule of law has been violated, after assuming that the facts have been viewed in the most favorable light which the case will admit of, and that the general conclusion of the referee as contained in his report, will be inferred to have involved a finding by him not in terms expressed, upon all the material questions. *Phelps v. McDonald* (26 N. Y., 82) follows 22 N. Y., supra, and is like it, in the facts. *Milhan v. Sharp* (27 N. Y., 624) is also based upon that decision. In *Smith v. Coe* (29 N. Y., 666), the one fact found by the judge was sufficient to sustain his conclusion of law, and the court, questioning the necessity of his finding upon the minor facts which led to that material one, held that the presumption would be, even if that should be considered as a conclusion of law, that the judge had found all the facts which were necessary to sustain such conclusion. In *Brainard v. Dunning* (30 N. Y., 211) the report of the referee was very imperfectly made up. "Where the findings are thus imperfect," say the court "the

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Opinion of the Court, per FOLGER, J.

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findings of fact necessary to sustain the judgment will be presumed." These are the cases commonly cited to sustain the position of the respondent. It will be seen that they do not present the question which is raised by the findings and the refusal to find in the case before us. Here there is a lack of findings, important to sustain the judgment given. Nor is there silence in the case in regard to them. The case is not imperfectly made up. The points are clearly presented. They are brought distinctly to the attention of the referee. He does not negative them, nor does he affirm them. He refers to his report for his decision upon them, and expressly refuses to find further than he has therein found. From that, it is evident that, in his opinion, they followed as legal inferences from the facts which he did find, and his judgment was, that fraud and intent to deceive were, without further proof, pronounced by the law the necessary concomitant of a false representation and loss sustained thereby. Without designing or desiring to question the cases above cited, and those akin to them, we hold, then, that where the finding of facts does not contain enough to sustain the conclusion of law, and it appears from the case that a request to find upon the material facts not found was refused, otherwise than as found in the report, and that that is silent thereon, this court will not presume, in aid of the judgment, that there was a finding not expressed in terms. And the decision in *Comstock v. Ames* (3 Keyes, 357) is somewhat in point. There a referee had failed to find facts needful to sustain his conclusion of law. The court say: "We cannot assume the existence of facts in opposition to those found by the referee, for any purpose. But when certain facts are expressly found, and certain other facts are studiously omitted to be found, and the existence of the latter are necessary to sustain a judgment, it is reasonably clear that a rule of law has been violated in rendering the judgment." And the judgment was there reversed, though the court also looked into the testimony, and were of opinion that it would not warrant other findings of fact than those made by the referee (p. 359).

## Statement of case.

It is not necessary that we examine the other questions presented by the appellant.

The judgment of the court below should be reversed, and a new trial ordered, with costs to abide the event.

All concurring, except ANDREWS, J., who took no part,  
Judgment reversed, and new trial ordered; costs to abide the event.

THOMAS OBERLANDER and another, Respondents, v. CASPAR SPIESS and another, Appellants.

To maintain an action for fraud and deceit based upon false representations, the representations must not only be false in fact, but the party making them must believe or have reason to believe them to be false, and such false representation must influence the other party to contract.  
(Per GROVER, J.)

The rule that, where there appears in the report no finding by a referee upon particular material facts, the court will, in reviewing the judgment upon appeal, presume, in support of the judgment, that he did find such fact in favor of the party recovering, is only applicable where from the case it appears that such additional finding of fact would have been warranted by the evidence.

Where the plaintiffs contracted to sell land to the defendants, and the defendants offered in payment certain bonds, which bonds the plaintiffs at first refused to receive but finally consented to do so, upon the assertion of the defendants that they were good, as good as cash, and the referee found that the bonds were worthless, and the representation was false and made to induce the plaintiffs to accept the bonds, and that the defendants could not have known such representations to be true, and therefore gave judgment for the plaintiffs, in an action brought by them for fraud and deceit.—*Held*, this conclusion was not authorized by the finding; and *held*, further, that it was error to reject evidence offered by the defendants to show that, prior to the transfer of the bonds, they had made inquiries in respect to their value, and that from such inquiries they believed them to be good.

(Argued December, 1870; decided January 26, 1871.)

APPEAL from a judgment of the General Term of the Supreme Court in the first judicial district, affirming a judgment for the plaintiff entered upon a report of a referee.

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## Statement of case.

By an agreement dated the 22d January, 1863, the plaintiffs agreed to sell to the defendants two lots in the city of New York, worth not less than \$4,000, for the sum of \$4,100. At the time of making the agreement one of the defendants offered in part payment (\$2,000) the bonds of the Logan County Mining and Manufacturing Company of Virginia, at par value. The plaintiffs at first objected to receiving the bonds but, finally, upon the statement of the defendant that the bonds were good, that they were as good as cash, they consented to do so. The lots were afterward conveyed to the defendants and the bonds transferred to the plaintiffs as part of the consideration. The bonds were worthless, and this action was brought to recover the damages sustained by the alleged deceit and fraud of the plaintiff. The referee did not find any actual fraudulent intent on the part of the defendants or that they were aware that their statements were false. He found, however, that the defendant had represented as true, that which was not true and which he could not have known to be true, to the gain and advantage of defendants, and the loss of the plaintiffs, and thereupon gave judgment for the plaintiffs. The defendants appealed to the General Term, where the judgment of the referee was affirmed.

*Stephen H. Olin* for the appellants (*R. B. Roosevelt* with him), insisted that the falsity of the representations made by them, not being known to the defendants they were not liable. (*Atwood v. Small*, 6 Cla. & F., 444; *Burns v. Burnett*, 2 H. & L., 529; *Moens v. Heyworth*, 10 M. & W., 147; *Paisley v. Freeman*, 1 Smith, L. C., 55; *Hopkins v. Tanqueray*, 21 L. J., C. P., 162; *Salisbury v. Stainor*, 19 Wend., 159; *Ormrod v. Huth*, 14 Mees. & Welsby, 651; *Marsh v. Falker*, 40 N. Y., 562; *Sandford v. Handy*, 23 Wend., 260, 268; *Thomas v. McCann*, 4 B. Monroe, 601; *Hubbard v. Briggs*, 31 N. Y., 530; *Foley v. Coghill*, 5 Black., 118.)

*Beach & Beaman*, for the respondents, insisted that every intendment of law as well as fact, is, as matter of legal right,



## Opinion of the Court, per GROVER, J.

to be made in support of judgments on appeal. (*Carman v. Pultz*, 21 N. Y., 551; *Viele v. Troy and Boston R. R. Co.*, 20 N. Y., 184; *Rider v. Powell*, 28 N. Y., 310; *Grant v. Morse*, 22 N. Y., 323; *Bentley v. Smith*, 2 Keyes, 342; *Lefler v. Field*, 50 Barb., 408; *Brainard v. Dunning*, 30 N. Y., 216; *Richardson v. Durgan*, 8 Bosw., 212.) That the facts as found by the referee were sufficient to sustain the action. (Addison on Torts, 3 ed., 830; *Bennett v. Judson*, 21 N. Y., 238; *Stone v. Denny*, 4 Met., 162; *Sharp v. Mayor*, 40 Barb., 256; *Smith v. Richards*, 13 Peters, 26; *Craig v. Ward*, 3 Abb. U. S., 239; 40 N. Y., 566.)

GROVER, J. The counsel for the respondent insists that he was entitled to recover by proving that the representations made by the defendants upon the sale of the bonds to them were false. The bonds in question were those of a corporation organized pursuant to the statutes of New York, called Logan County Mining and Manufacturing Company of Virginia, having several years to run before maturity, and drawing interest at six per cent, payable semi-annually, at the office of the company in the city of New York. Payment of the bonds was secured by a mortgage to a trustee purporting to cover over one hundred thousand acres of land situated in West Virginia. The referee found that the defendant Rozwog, to induce the plaintiffs to accept the bonds as offered, and to overcome the objections of the plaintiffs to the same, then represented that the bonds were good, and that they were as good as cash, and repeatedly made such and other affirmations to the same effect in regard to them. The referee further found that these representations were false, but did not find that the defendants knew them to be false, or any fact inconsistent with the idea that the defendant in good faith believed them at the time to be true. The action is not founded upon contract, but upon the alleged deceit and fraud practiced by the defendants upon the plaintiffs, to induce them to purchase the bonds. The question, therefore, is whether a recovery can be sustained in the absence of proof

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Opinion of the Court, per GROVER, J.

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that the defendants believed or had reason to believe that the representations were false at the time, and for that reason that they were fraudulently made. That such proof is necessary to a recovery is an elementary principle. (2 Kent's Commentaries, 482-489). In *Attwood v. Small* (6 Clark & Finnelly, House of Lords Cases, 444), Lord Brougham says: If two parties enter into a contract, and if one of them, for the purpose of inducing the other to contract with him, shall state that which is not true in point of fact, which he knew at the time he stated it not to be true, and if upon that statement of what is not true and what is known by the party making it to be false, the contract is entered into by the other party, then, generally speaking, and unless there is more than that in the case, there will be at law an action open to the party entering into such contract; an action of damages, grounded upon the deceit; and there will be a relief in equity to the same party to escape from the contract which he has so been inveigled into making by the false representations of the other contracting party. In one case, it is not necessary that all those three circumstances should concur in order to ground an action for damages at law, or a claim for relief in a court of equity. I mean in the case of a warranty given, in which the party undertakes that the fact be so, and in which case, therefore, no question can be raised upon the scienter upon the fraud or willful misrepresentation. In this case that is clearly out of the question; therefore, all these three circumstances must combine: First, that the representation was contrary to the fact; secondly, that the party making it knew it to be contrary to the fact; and, thirdly, and chiefly, in my view of the case, that it should be this false representation which gave rise to the contracting of the other party. (See also, *Ormrod v. Hutth*, 14 Meeson, 2 Welsby, 651.) All the confusion that has arisen upon this point, has been from a misapplication of a class of cases where the party making the representation of a fact has asserted its existence as within his personal knowledge, as contra-distinguished from belief or opinion. *Bennet v. Judson* (21 N. Y., 238), belonged to this

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class. See *Marsh v. Falker* (40 N. Y., 562) where this class of cases was reviewed, and the principle upon which they were decided pointed out. The representations in the present case were strong expressions of belief and opinion. They do not legally imply that Roswog had made any personal examination of the pecuniary affairs of the corporation by which they were issued, or of the value of or title to the lands by which they were secured, and thus had acquired personal knowledge of the value of the bonds, and that he was speaking from such personal knowledge. Consequently, proof that the representations were false did not show him guilty of falsehood or fraud in making them.

The counsel for the respondent also insists upon the rule that where there has been no finding of the referee upon a question of fact, the court will, in reviewing the judgment upon appeal, assume, in support of the judgment, that he did find such further facts in favor of the party recovering as are essential to uphold it. The counsel is right in this respect. (*Grant v. Morse*, 22 N. Y., 323. *Rider v. Powell*, 28 id., 310; *Doty v. Carolus*, 31 N. Y., 549.) But this rule is applicable only where, from the case, it appears that such additional findings of fact would have been warranted by the evidence. An examination of the testimony in this case shows that some facts were proved by the plaintiffs tending to show that the defendant Roswog was aware of the falsity of the statements at the time of making them and evidence was given by the defendants tending to repel any such conclusion. It is unnecessary to determine whether the evidence would have warranted such further finding, and thus bring the case within the rule, for the reason that competent evidence upon this point was offered by the defendants and an exception taken to its rejection by the referee. The defendants offered to prove that prior to the sale of the bonds to plaintiffs they had made inquiries in respect to their value, and that from the information so received, they believed the bonds to be good and fully worth their par value. The rejection of this evidence was erroneous. The point in issue

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Statement of case.

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was, whether the defendants believed the representations true or were aware of their falsity. Upon this point it was competent for the defendants to show that they had made inquiries in relation to the value of the bonds, and the information they had acquired thereby, and that from such information they believed the bonds were worth more than par at the time of making the statements.

The judgment appealed from must be reversed and a new trial ordered, costs to abide event.

All the judges concurred in the result.

NOTE.—This case, when decided, was understood by the reporter as expressing by the court merely a concurrence in the result as to the error of excluding the testimony, without passing definitely upon the propositions of the opinion. It appears, however, by the opinion of FOLGER, J., in *Meyer v. Amidon*, above, that the court did decide in *Oberlander v. Spiess*, the propositions stated by him. The two cases are therefore reported together.—REP.

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WILLIAM J. DOUNCE, Appellant v. SAMUEL J. PARSONS and  
NATHAN H. MYRIOK, Respondents.

A copartnership was dissolved and a new firm under the same name formed, with the same members, except one, whose place was supplied by the defendant. The new firm did not assume the debts of the old firm. B, one of the original partners, induced the plaintiff to furnish him with money, to buy up the debts of the old firm, representing to the plaintiff, that they could be purchased at a large discount. Instead of buying up the old debts, B, upon receiving the money from the plaintiff, delivered to him, as such antedated notes, drawn and endorsed by him in the firm name, and depositing the plaintiff's money to the credit of the new firm in the bank, checked it out in the firm name, and applied the greater part of it to the payment of the debts of the old firm, all the other defendants being ignorant of the whole transaction. In an action on these notes, brought by the plaintiff,—*Held*, that the new firm were not liable for them, and that he could not recover.

(Argued February 22, 1871; decided March 21, 1871.)

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Statement of case.

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APPEAL from a judgment of the late General Term of the Supreme Court, in the Sixth judicial district, reversing a judgment for the plaintiff, entered upon the report of a referee, and ordering a new trial. Action upon promissory notes. On the first of January, 1867, the firm of Myrick, Haight & Co., before then existing, was dissolved, and a new firm, under the same name, was organized. The partners were the same in each firm, except that Samuel J. Parsons became a partner in the new firm, in the place of James Greenwood, a member of the old firm. At the time of dissolution, the old firm was largely indebted, but such debts were not assumed by the new firm, nor had the defendant, Parsons, any knowledge of them. During the month of January, 1867, Bemis, who was a member of both firms, informed the plaintiff of the above facts, and that the notes of the old firm could be bought in New York, at a discount of eighteen to twenty per cent. An arrangement was then made between the plaintiff and Bemis, by which the plaintiff advanced to Bemis, moneys with which Bemis agreed to buy for him, such notes of the old firm. Bemis, thereupon made and executed the notes in suit, and signed the name of Myrick, Haight & Co. thereto, making them payable to their own order, and endorsed the same, payable to the order of the plaintiff in the firm name, dating them, with one or two exceptions, prior to the first of January, 1867, and sent them to the plaintiff as and for the notes of such old firm, purporting to have been bought by him in the market. The proceeds of these notes were credited to Bemis on the books of the new firm, but were mostly drawn out and applied by him on the debts of the old firm. The new firm was dissolved in March, 1867. Parsons had no knowledge of these dealings between the plaintiff and Bemis, until after the commencement of the action. The notes were not paid when due, and in May, 1867, this action was brought against the co-partners in the new firm. The defendant Parsons answers separately, denying the liability of the new firm and alleging usury. The defendants Myrick, Haight and Bemis answer separately, setting up the like defences. The

referee found for the plaintiff, and judgment was entered on this report against all the defendants for \$10,693.64. The General Term reversed this judgment, and the plaintiff appealed to this court.

*J. R. Ward*, for the appellant, insisted that defendants were liable for the tortious act of their co-partner. (Parsons on Part., 150; *Locke v. Stearns*, 1 Met., 564; *Manf. and Mech. Bank v. Gore & Grafton*, 15 Mass., 75; *Boardman v. Gore*, id., 331; *Whittaker v. Brown*, 16 Wend., 505; *Richardson v. French*, 4 Met. 577.)

*Geo. B. Bradley*, for respondents, insisted that it was a personal transaction between Bemis and plaintiff, and therefore defendants were not liable. (Collyer on Part., 4 Am. ed., § 483; 3 Kent's Com. 5th ed., 42, 43; *Livingston v. Roosevelt*, 4 Johns., 251; *Gansevoort v. Williams*, 14 Wend., 135; *Talmadge v. Penoyer*, 35 Barb., 120, 129; *Jaques v. Marquand*, 6 Cow., 497, 503; *Loyd v. Freshfield*, 2 Carr. & Payne, 325; *Ex parte Apsey*, 3 Brown, Ch., 365; *Vallett v. Parker*, 6 Wend., 619; *Boyd v. Plumb*, 7 Wend., 309; *Foot v. Sabin*, 19 John., 154-157; *Ex parte Bonbonus*, 8 Ves., 540, 544; *Rogers v. Bachelor*, 12 Peters, 229; *Eastman v. Cooper*, 15 Pick., 276.)

ALLEN, J. The judgment upon the report of the referee was properly reversed and a new trial granted by the Supreme Court. The reasons assigned by Judge BOARDMAN for such action, are satisfactory. The money for the recovery of which this action was brought, was not advanced to or for the defendants or upon their credit, and the notes transferred to the plaintiff were not in fact, and did not purport to be notes of the defendants firm and were not given in their business.

The transaction was entirely disconnected with the business of the partnership composed of the defendants and was so understood by the plaintiff who gave credit only to Bemis, by entrusting him with the money to purchase for him and as his

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agent, the notes of another firm, before then dissolved, and the notes transferred were delivered to and accepted by the plaintiff as the notes of that firm. Bemis perpetrated a fraud on the plaintiff but not in the business or as the agent of the defendants. Had the plaintiff shown that the money, although entrusted to Bemis for a special purpose, had been diverted and appropriated by the defendants to their use with knowledge that it was the money of the plaintiff, an action upon the notes, or for money had and received, might have been maintained. They would then with knowledge of the facts and with their assent have become the debtors of the plaintiff, but the evidence came far short of proving such a state of facts. The money was placed by Bemis to the credit of the firm in bank and checked out by him in the firm name, and chiefly, if not entirely, in the payment of the debts of the extinct firm, and if in a sense the defendants (the new firm), may be said to have received the money, it was not as the money of the plaintiff, but of Bemis, who had credit for it. Had the money been borrowed for the firm in the ordinary course of business, the defendants would have been liable. But Bemis was the trustee and agent of the plaintiff and having the money in his hands in that capacity, placed it with that of the firm and took to himself credit for it. The other parties were ignorant of the relations between him and the plaintiff, as well as of the source from which the money came. The relation of debtor and creditor as between the plaintiff and the defendants, did not result from that transaction. (*Jaques v. Marquand*, 6 Cow., 497; *Hutchinson v. Smith*, 7 Paige, 33; *Richardson v. French*, 4 Met., 577; *Smith v. Craven*, 1 Cr., and Jer., 500.)

The order granting a new trial should be affirmed, and judgment absolute go against the plaintiff pursuant to the stipulation.

All the judges concurring, judgment affirmed.

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ZENAS T. BURNELL, Appellant, v. THE NEW YORK CENTRAL  
RAILROAD COMPANY, Respondents.

Where a common carrier has contracted to transport a passenger and his baggage, although his strict liability as a common carrier ceases upon a failure of the owner to call for his baggage within a reasonable time after its arrival at the place of destination, a modified liability, analogous to that of warehouseman, still exists; and the carrier is bound to exercise ordinary care in keeping and preserving the property until it is called for or disposed of according to law.

This obligation is not a new and independent obligation, arising from the unprovided for and accidental circumstance of the property being left in the hands of the carrier, but is imposed by the contract of carriage, and therefore rests upon the carrier with whom the contract was made, although the place of destination is beyond its route.

The failure of the carrier, in such case, to deliver the property to the owner when demanded, *prima facie* establishes negligence and want of due care; and the *onus* of accounting for the default lies with the carrier.

The plaintiff purchased a ticket of the defendants, a railroad corporation, at a point on their line, for New York, and had his baggage checked for that city. He arrived there, by the Hudson River railroad, a connecting line of road, at nine o'clock in the morning, and about noon of that day gave his check to an expressman in the city of Brooklyn, with directions to get the trunk from the depot of the Hudson River railroad for him. The expressman neglecting to do so, when two days afterward, the plaintiff demanded the trunk at the depot, it could not be found. The defendants had, in pursuance of an arrangement with the Hudson River Railroad Company, transferred the baggage to the latter at Albany, and it had been conveyed by them to New York and deposited in their depot. In an action brought by the plaintiff to recover the value of his trunk, and contents.—*Held*, that he was entitled to recover, in the absence of any proof on the part of the defendants accounting for the failure to deliver it.

(Argued February 20; decided March 21, 1871.)

APPEAL from an order of the General Term of the Supreme Court of the first judicial district, reversing a judgment for plaintiff, entered upon the report of a referee, and granting new trial.

On the 5th day of March, 1866, the plaintiff purchased, at the ticket-office of the defendants, at Palmyra, a ticket for the city of New York, and his baggage, consisting of a trunk,



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was regularly checked, and placed in their custody. By an arrangement between the defendants and the Hudson River Railroad Company, passengers from Palmyra to New York were carried from Albany, by the latter company, to its station at the foot of Thirtieth street, in the city of New York, where the baggage of the passengers is delivered by them.

The plaintiff and his baggage reached the city of New York on the 6th of March, 1866, at about 9½ o'clock A. M. The plaintiff, instead of calling for his trunk upon the arrival of the train, immediately proceeded to the house of his mother in Brooklyn, where he purposed to stop, and, at about noon of the same day, gave the check for his baggage to an expressman in Brooklyn, with directions to get the trunk from the Hudson River Railroad Company's station. The expressman never called for the trunk; and, on the morning of March 8th, the plaintiff called at the depot and demanded his trunk, but upon searching for it, it could not be found.

This action was brought to recover the value of the trunk. The referee found that the delay of the plaintiff was not, under the circumstances, unreasonable, and that the trunk was lost through want of ordinary care and diligence by the defendants, and gave judgment for the plaintiff.

The General Term reversed this judgment, and plaintiff thereupon appealed to this court.

*A. C. Morris*, for the appellant, insisted that, by the contract of carriage, defendants were liable for the baggage until called for. (*Norway Plain Co. v. Boston & Me. R. R. Co.*, 1 Gray, 271, 274; *Cary v. Cleveland and Toledo R. R. Co.*, 29 Barb., 35; *Fisk v. Newton*, 1 Denio, 47; *Ostrander v. Brown*, 15 Johns., 42; *Van Horn v. Kermit*, 4 E. D. Smith, 454.)

*James Matthews*, for respondent, insisted that defendants were not liable as carriers. (*Roth v. The Buff. and St. L. R. R. Co.*, 34 N. Y., 548; *Jones v. Norwich Trans. Co.*, 50 Barb., 193; *Holdridge v. Utica and Black River R. R. Co.*, 56 id.,

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191.) That they were, in any event, merely gratuitous bailees. (Story on Bail., §§ 17, 23, 62, 64, 65, 79, 97; Edwards on Bail., 44, 45, 69, 70, 95, 102, 103, 105, 107, 129; Angell on Carriers, §§ 10, 11; *Dorman v. Jenkins*, 2 Adolph. & Ellis, 256; *Foster v. Essex Bank*, 17 Mass., 479; *Knapp v. Curtis*, 9 Wend., 60.)

CHURCH, Ch. J. The plaintiff took passage, at Palmyra, on the defendant's road for New York, and purchased a ticket and checked his trunk to the latter place. On his arrival in New York, the plaintiff, without calling for his baggage, went to Brooklyn, and the second day after his arrival presented his check and demanded his trunk, but it could not be found, and has not since been found. This action was brought to recover the value of the trunk and contents. The referee found that the trunk was lost through the negligence of the defendants and their servants, and that the plaintiff was entitled to recover, upon which a judgment was entered, which was reversed by the General Term, in the first district, and a new trial ordered, from which the plaintiff appealed to this court.

The Supreme Court placed its decision upon the ground that the defendants' liability ceased with the transportation of the trunk by the Hudson River Railroad Company, to New York, and its readiness to deliver it within a reasonable time after arrival, and that whatever responsibility was incurred afterward, in keeping or storing it, was incurred by the latter company, for which the defendants were not liable.

The correctness of this decision depends upon the nature of the contract between carrier and passenger, in respect to the custody and care of baggage upon the failure of the owner to call for it within a reasonable time after its arrival at the place of destination.

As to what is a reasonable time cannot be definitely determined, but must be left to the circumstances of each case. Up to the expiration of that period the strict liability of common carriers continues. After that a modified liability, anal-

agous to that of warehousemen only exists. The rule of exemption from strict liability was carried to the utmost limit of propriety, to say the least of it, in *Roth v. Buffalo and State Line R. R. Co.* (34 N. Y., 548.)

It is unnecessary to attempt a definition of *reasonable time*, as applied to this subject in this case, because it is clear that sufficient time had elapsed to relieve the carrier from his peculiar liability as insurer of the property. But there still remained a duty or obligation on the part of the Hudson River company, to exercise ordinary care in keeping and preserving the property until it was called for, or was disposed of according to law. The question is whether this obligation, with its modified liability, was imposed by the contract of carriage, or whether it was a new and independent obligation, arising from the unprovided for and accidental circumstance of leaving the trunk in possession of the carrier. If the latter is the correct theory, then the defendants are not liable, and the action should have been against the Hudson River company; if the former, they are liable, because by their contract they assumed the responsibility of every duty and obligation imposed by the contract of carriage. The Hudson River company were their agents in performing the contract.

In considering such questions, it is proper to regard the improved facilities of traveling, with its incidental contingencies, accidents and conveniencies, and the usual mode of transacting such business, to the end, that while on the one hand, onerous and unnecessary duties should not be imposed upon the carrier by an unnatural or arbitrary construction of the contract, on the other hand, that it should be so construed as to afford reasonable protection to the public. The rule applicable in the construction of all contracts, that existing facts and all the surrounding circumstances, are to be regarded for the purpose of effectuating the intent of the parties is also to be applied. I think the duty or obligation referred to, of storing the property and exercising ordinary care to preserve and protect it upon the happening of the contingent event of its not being called for, was incurred at the time the

contract was made, and is a part of the contract itself. It is to be presumed that the parties intended to provide for every contingency incident to the subject of the contract.

Leaving baggage with a carrier by railroad, either for temporary convenience, from necessity, sickness or accident is not such an unusual or exceptional circumstance, as to create a presumption that it was not within the contemplation of the parties at the time the contract was made.

The duty of exercising care over property thus remaining in their possession, is a part of the duty of carriers, incidental it is true to their principal or main duty, but nevertheless incumbent upon them, and it is no less a duty growing out of their relation of carriers, because their liability is mitigated to that of ordinary bailees for hire. Besides this is the ordinary mode in which this business has been transacted, as the evidence in this case shows, and as all railroad companies are in the habit of doing. Baggage thus left is and always has been kept and cared for, and the manner of disposing of it, if not finally called for, was long since regulated by law (Laws of 1837, p. 311), and it is presumed that the parties contracted with reference to the existing state of facts, and to the customary manner of transacting such business.

The other view terminates all relations between carrier and passenger, immediately upon the expiration of the "reasonable time," within which the baggage must be called for, and transforms the carrier into a mere accidental finder, or gratuitous bailee liable only for gross negligence. In other words, it makes two contracts in every case where baggage is left, and complicates the rights and duties of the respective parties, and while it essentially impairs the security of the public, confers no substantial benefit upon the carrier. Its tendency would be to induce carelessness and negligence, where care and vigilance is necessary. The fair construction of the contract is that the defendants agreed for a consideration to transport the plaintiff and his trunk to New York, and deliver the latter to him on its arrival, if called for, if not that it should be properly stored, and reasonable care

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exercised to prevent injury or loss until it was called for, or was lawfully disposed of. This simplifies the transaction, carries out the intention of the parties, legalizes the uniform practice, and does justice to the carrier and the public. Although the rule on this subject, has not been very definitely settled, yet the principles herein indicated are not new. (*Cary v. Cleveland & Toledo R. R. Co.*, 29 Barb., 35; *The Norway Plain Co. v. B. & M. R. R.*, 1 Gray, 271 and cases cited.)

These views in effect determine the liability of the defendants in this action. The Hudson River company being the agents of the defendants in performing the contract, and the contract of storage, being a part of the original contract of carriage, it follows that the defendants are liable for the loss in this case if any one is liable. ALLEN, J., in 29 Barb., 35, said, "There was but one contract, one hiring and one consideration paid for the carriage and storage of the baggage; the contract for storing resulting from and being an incident to the main contract for carriage. It follows that the party liable upon the main and express contract, is liable upon the incidental and implied contract, and the Buffalo and State Line road, in the storage as in the carriage of the trunk must be deemed the agent of the defendant performing its contract." (*Hart v. R. & S. R. R. Co.*, 4 Seld., 37; *Quimby v. Vanderbilt*, 17 N. J., 306.)

The only remaining question is whether a cause of action was established, based upon the negligence of the Hudson River Company. The failure of that company to produce the subject of bailment when demanded, *prima facie* established negligence and want of due care. When there is a total default to deliver the goods bailed, on demand, the *onus* of accounting for the default lies with the bailee. (*Platt v. Hibbard*, 7 Cowen, 497-500, note a; *Schwerin v. McKie*, 5 Robts. R., 404, and cases cited.) It is claimed that the failure to produce the trunk, and the charge of negligence is fully met by the evidence produced on the part of the defendants, that the building used for storing baggage was safe and secure

and in charge of trusty agents and servants, and properly guarded night and day. There was no evidence as to how this particular trunk got out of the possession of the Hudson River company. If it had been burned or stolen, without fault on their part, the defendants would not have been liable.

The evidence certainly shows a commendable vigilance in the general arrangements to protect this class of property, but it fails to point out how or by what means this trunk was lost. The inference that it was delivered to the wrong person by mistake is quite as legitimate as that it was stolen. To say that the servants were generally careful, does not establish as a question of law, that they were not careless in respect to this article. It was incumbent on the defendants to show that the loss of this trunk was not attributable to the want of care of their servants, and the evidence was such that the referee was justified in finding that they had failed to do it.

If this trunk was delivered to the wrong person the circumstances should have been shown, otherwise it would be presumed negligent, as no such delivery would be proper without the presentation of the duplicate check, or satisfactory evidence of its loss, and of the ownership of the property. If the trunk had been delivered upon such evidence as vigilant, careful persons would regard as sufficient, the defendants might have been relieved from liability, but no evidence of this character was produced, and we think the finding of the referee was fully warranted.

The order granting a new trial must be reversed, and the judgment affirmed.

RAPALLO, J., dissented. ANDREWS J., took no part. All the others concurring, the order granting a new trial was reversed and the judgment affirmed.

## Statement of case.

MARTHA BARKER, Respondent, v. JAMES SAVAGE and JAMES GORMLEY, Appellants.

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To enter upon a street crossing in a city where the moving vehicles are numerous, and a collision with them likely to produce serious injury, without first looking in both directions along the street, to ascertain whether any are approaching, and, if so, their rate of speed, and how far distant they are from the crossing, is negligence.

Footmen have no right of way, at a crossing in a city street, superior to that of vehicles. Each have the right of passage in common, and in its use are bound to exercise reasonable care for their own safety, and to avoid doing injury to others who may be in the use of the right of way with them.

Where the plaintiff, a woman, sixty-four years old and lame, was crossing Third avenue, in New York city, at ten o'clock in the morning, and the driver of a cart, going at the rate of four miles an hour, when at a distance of twelve feet from the plaintiff, called to her, which call was heard by persons more distant from the cart than the plaintiff, but the plaintiff nevertheless kept on, and was run down and injured, — *Held*, that a charge by the court to the jury, to the effect that the plaintiff was only required to look ahead along the crossing, and if, in so looking, she discovered no obstacle, then she was not negligent in proceeding to cross, was erroneous.

(Argued February 22; decided March 31, 1871.)

APPEAL from a judgment of the General Term of the Superior Court of the city of New York, affirming a judgment in favor of the plaintiff.

The action was for damages resulting from a personal injury alleged to have been caused by negligence of the defendant Gormley, while driving a cart belonging to the other defendant.

The plaintiff was a woman, of over sixty-four years of age, and was lame, walking with a crutch. She was crossing Third avenue, the lower crossing at Forty-first street, at about ten o'clock in the morning, going from the west side. The defendant Gormley was driving his cart up the avenue, at the rate of about four miles an hour, going north on the east railroad track, and the plaintiff had not reached the east track, when

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the driver, then about twelve feet from the plaintiff, shouted to her and pulled in his horse. The shout was heard by witnesses at a greater distance from the cart than the plaintiff was, but she paid no attention to it, and continued advancing, and, just as she was passing over the easternmost rail, the accident occurred. The plaintiff testified that she did not hear the driver, and accounted for it by the fact that she wore a hood.

On the close of the plaintiff's proofs, the counsel for defendants moved that plaintiff be nonsuited, on the ground that the evidence showed the driver to be free from negligence. This motion was denied, and defendants excepted. Another motion for a nonsuit was made after all the evidence was in, which was also denied. Exceptions were taken to two parts of the judge's charge; to the charge that a person crossing the street had the right of way, and a driver was bound to care for him; and to the charge that a person crossing the streets was not bound to look either way, but had the right to look straight before him, and it was the duty of the driver to keep out of his way and not come into collision with him. The jury found for the plaintiff, and the defendants appealed to the General Term, where the judgment was affirmed. The case at General Term is reported in 1 Lansing, 228.

*John K. Porter*, for the appellants, insisted that plaintiff's negligence was contributory. (*Steves v. Oswego R. R. Co.*, 18 N. Y., 423; *Ernst v. Hudson River R. R. Co.*, 39 id., 68; *Wilcox v. Watertown R. R. Co.*, id., 358, 368; *Grippen v. N. Y. Central R. R. Co.*, 40 N. Y., 51; *Nicholson v. Erie R. Co.*, 41 id., 542; *Baxter v. Troy and Boston Co.*, id., 502-505; *Harty v. Central Co.*, 42 id., 472.) That court's charge was erroneous. (*Cotton v. Wood*, 8 Common Bench, N. S., 571; *S. C.*, 98 Eng. Com. Law, 571.)

*E. D. Culver*, for the respondent.

GROVER, J. It was the legal duty of the plaintiff, in crossing the avenue, to exercise reasonable care to protect



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herself from injury by a collision with vehicles that were traveling thereon. If the omission of such care by her contributed to the injury received, she could maintain no action therefor. In *Hartfield v. Roper* (21 Wend., 615), COWEN, judge, says: "That it is perfectly well settled that if a party injured by a collision on the highway, has drawn the mischief upon himself by his own neglect, he is not entitled to an action, even though he be lawfully in the highway pursuing his travels. (See also, *Rathbun v. Payne*, 19 Wend., 399). The only question usually arising in such cases is, as to what constitutes reasonable care. This question has often arisen and been determined in cases of collision with trains, where railroad tracks intersect a highway. In these cases, it has been held that reasonable care requires a vigilant use of the senses, of the eyes, and ears in looking and listening for trains, so as to be able to avoid any collision therewith, and that the omission of this care, if contributing to an injury, will preclude a recovery therefor. (*Nicholson v. The Erie Railway Co.*, 41 N. Y., 542; *Baxter v. Troy and Boston Co.*, id., 502; *Harty v. Central Co. of N. J.*, 42 N. Y., 472.) These cases show that reasonable care is such as prudent persons exercise, when contemplating the danger that may be encountered at such crossings. That danger arises from the great speed at which trains are usually run, and from the almost inevitable destruction arising from collision therewith. The same principle applies to street crossings in cities and road crossings in the country, reasonable care being such as the danger to be apprehended from collision, renders necessary for protection in case others in the exercise of their right of way, observe due and proper care on their part. In the application of this principle it is obvious that less care is required in crossing the streets and avenues of cities at the usual street crossings than at railroad crossings, for the reason that vehicles traveling thereon move at much less speed than railroad trains, and are, to a much greater extent, under the immediate control of those having charge of them. The constant active vigilance required for self preservation at railroad crossings is not

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equally requisite at street crossings for this purpose, and is not therefore, at the latter crossings, required by reasonable care. Nevertheless these crossings are not free from danger to footmen, and at those most crowded there is serious danger to be apprehended. Reasonable care requires, in all cases, the exercise of vigilance proportioned to the danger encountered. To enter upon a street crossing in a city where the moving vehicles are numerous, and a collision with them likely to produce serious injury, without looking in both directions along the street to ascertain whether any are approaching, and if so their rate of speed, and how far from the crossing, would not only be the omission of reasonable care for his own safety, but an act of rashness. It is likewise the duty to look at street and road crossings for a like purpose, when there may be danger from approaching vehicles, although the travel may be quite trifling, for the reason that vehicles may be approaching so as to make it dangerous for footmen to proceed. In impressing this degree of care upon footmen for their own safety, the law does not exonerate those in charge of the vehicles from the exercise of similar care, that is, such care as is proportioned to the danger to be apprehended to themselves, and especially to footmen, from collision. They are required not only to make a vigilant use of their senses to discover any one exposed to danger, but so to control the movement of their team as to avoid it to the extent of their power when discovered. Applying these principles to the present case, the court did not err in refusing to nonsuit the plaintiff upon the ground that the driver was free from negligence. The testimony shows that the driver not only could, but did in fact see the plaintiff some fifteen feet distant from her, and from the testimony, it is probable he could have seen her at a greater distance. Under these facts, and the other testimony, it was a proper question for the jury whether he could not have stopped his horse in time, or so have guided it as to have avoided running against her. If he could, his negligence, and the consequent liability of the defendant for the injury, so far as this question was concerned, was estab-

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lished. The other ground upon which the motion was based presents a more difficult question. There was no evidence that the plaintiff looked at all in either direction for approaching vehicles, and the evidence tends to show that she entered upon the crossing and walked along upon it without taking any precaution for this purpose. That had she looked she could have seen the horse and cart in time to have avoided the danger. That for some unexplained reason she failed to hear the cry of the driver, made for the purpose of notifying her of her danger, although such cry was heard by persons at much greater distance than the plaintiff, and which would have been heard by her in time to have avoided the danger, if reasonably attentive to the danger of her situation. We have already seen that it was her duty to look along the street to see if it was safe to proceed. This she could have done without stopping. Turning the eyes along the street required no special effort, and if her failure to do this contributed to the injury, she had no right of recovery. I think the evidence presumptively proved this, and that, upon this ground, the plaintiff should have been nonsuited. But the court erred in charging the jury that the plaintiff was only required to look ahead along the crossing, and if, in so looking, she discovered no obstacle thereon, she was not negligent in proceeding to cross. In addition to this, it was her duty to look along the street in the vicinity of the crossing, upon both sides thereof, for a reasonable distance, to enable her to avoid danger from approaching teams. The exception taken to this part of the charge was sufficiently specific to raise this question. The court also erred in charging the jury that footmen had a priority of right of way, in crossing streets at the usual crossings, over teams traveling upon the street, and that it was the duty of the latter to avoid collision with persons so crossing the street. The effect of this instruction was to induce the jury to believe that a footman, having a prior right of way over a team, might venture upon the crossing, and, in so doing, was relieved from the exercise of such care for his safety as would have been required had the right of way of both been the same. If it

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was not the design to convey this idea to the jury, this portion of the charge was wholly without meaning. This may have misled the jury. Neither footmen nor teams have any right of way superior to the other. They each have the right in common, and equally with the other, and in its exercise are bound to exercise reasonable care for their own safety and to avoid doing injury to any others who may be in the exercise of the equal right of way with them. (*Cotton v. Wood*, 98 Com. Bench, 568.)

The judgment appealed from must be reversed, and a new trial ordered; costs to abide event.

CHURCH, Ch. J., ALLEN, FOLGER, and RAPALLO, JJ., concurred; PECKHAM, J., concurred in result only on ground of error in charge; ANDREWS, J., took no part.

Judgment reversed, and new trial ordered; costs to abide the event.

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THE PEOPLE ex rel. STEPHEN C. JOHNSON, Respondent, v. THE BOARD OF SUPERVISORS OF DELAWARE COUNTY, Appellants.

A county board of commissioners of excise has power to employ an attorney to conduct the prosecutions for penalties, which they are authorized to institute, and as it acts as the agent of the county in so doing, the claims for such services are a county charge.

An account for such legal services must be presented to the board of supervisors of the county, and must be audited and allowed by them; but the amount to be allowed, in the absence of express contract or statute, is somewhat in their discretion. But where the same are legally chargeable to the county, it is the duty of the board in good faith to audit them, and on their refusal to act, a mandamus is the proper remedy to compel them.

Where a board of supervisors has once considered a claim and audited and allowed it at a certain amount, a mandamus cannot issue to compel it to audit the claim anew and allow it at a greater amount, but where there are distinct and separate items in the account, the board of supervisors can no more wholly reject or refuse to audit one of those items, which is a legal charge, on the ground that it is not legal, than they can reject for

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that reason a whole account, and a mandamus will go to compel such audit.

What should be the form of a mandamus in such cases stated by FOLGER, J.

(Argued February 21, 1871 ; decided March 21, 1871.)

APPEAL from an order of the General Term in the Third department, granting a peremptory mandamus on an appeal by the relator from an order of the Special Term, denying a motion for an attachment against the board of supervisors for an alleged contempt.

During a portion of the years 1859 and 1860, the relator was attorney for the board of excise of Delaware county. He presented to the board of supervisors of that county his bill for the legal services rendered as such attorney to the excise board, including services in two suits known as the Coan and Sackrider suits. In the latter, a judgment was recovered before a justice of the peace, which was on appeal reversed in the County Court, and on appeal from the judgment of the County Court that judgment was reversed and that of the justice affirmed. Sackrider then appealed to the Court of Appeals, where after two arguments the judgment of the Supreme Court was reversed on the ground that the authority of the present relator to bring the suit in Justices' Court against Sackrider was not sufficiently proved.

The supervisors offered him the sum of \$300 provided he would release the county from all claims on account of the costs and disbursements recovered in the suits conducted by him. The relator refused to accept the proposition, and applied to the Supreme Court for a peremptory mandamus to require the board to vacate its order and to proceed and audit said accounts, which application was granted.

On the service of the mandamus, the board of supervisors made an order vacating their previous action, and referred the relator's accounts to a committee, who made a report allowing all the usual taxable costs in the actions, except the Coan and Sackrider suits, and disallowing all charges for disbursements and services made and rendered in subpoenaing

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and procuring the attendance of witnesses at court, other than the statute fees, and also rejecting the claims in the Sackrider suit, above mentioned. On an order to show cause why an attachment should not issue or *such other or further order* be made as might be proper, the Special Term denied the motion, and on appeal to the General Term that order was affirmed, but they ordered that a peremptory mandamus issue to the board of supervisors of Delaware county, commanding them to allow the relator the bills in the Sackrider suit as well as in the Coan suit, and all the other rejected items. The supervisors appealed from such order to this court.

The various charges and the grounds of rejection are mentioned in the opinion, as is also the order of the General Term.

*Wm. Gleason*, of counsel for the appellant: That mandamus was not the proper remedy, the Coan and Sackrider suits not being "legal charges," he cited *Brady v. Suprs. of New York* (2 Sand., 460); *People v. Suprs. of Cortland* (40 How., 53); *Boyce v. Suprs. of Cayuga* (20 Barb., 394); *People v. Suprs. of Columbia* (10 Wend., 363). That the remedy was by *certiorari* and not *mandamus*. (36 Barb., 118; 2 Crary Special Prac., 58; 11 Wend., 91; 19 id., 56-58; 14 Barb., 446; 39 id., 652; 18 Wend., 79; 9 id., 508; 14 Barb., 52; 12 Johns., 414; 1 Hill, 362-367; 5 Denio, 565; 33 Barb., 602.) That the supervisors must exercise their discretion. (12 Wend., 446; *The People v. Supervisors of St. Lawrence*, 30 How. Pr. R., 173.)

*Samuel Hand*, for the respondent: That the relator's claim was a county charge. (Laws of 1857, vol. 2, §§ 1, 5, 13, 22; *People v. Supervisors*, 32 N. Y., 473; *Bright v. Supervisors of Chenango*, 18 Johns., 242; *Doubleday v. Supervisors of Broome*, 2 Cow., 533; 1 R. S., 386, § 3, sub. 9.) That the refusal of the supervisors to audit the claim rendered them liable to a mandamus. (*Hull v. Supervisors of Oneida*, 19

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Johns., 259; *People v. Supervisors of Albany*, 12 Johns., 416.) The Supreme Court at General Term had right, as an original tribunal, to grant the mandamus. (*People v. Sheriff of Rensselaer*, 1 Code R., 135; *People v. Commissioners of Fort Edward*, 11 How. Pr., 89; *Van Rensselaer v. Sheriff of Albany*, 1 Cow., 501; *People v. Croton Aqueduct Board*, 49 Barb., 259.) This court, if they regard the order of the General Term as covering too much ground, can modify it with regard to its specification of amounts, and as to items which are discretionary.

FOLGER, J. We have no doubt but that the board of commissioners of excise had the power to employ an attorney and counselor at law, to conduct for them their legal business, and to give them advice, from time to time, as they should need it. The act by which they are created imposes upon them the duty, when cases arise, of commencing and prosecuting legal proceedings. As there is no provision in the act that the members of the board shall be appointed of those who possess the acquired ability to conduct such proceedings, the implication is necessary that when they are obliged, in the performance of their duties, to seek the aid of the courts, they have the power to act by attorney, and with counsel retained by them. And as the board are the agents of their county in the matters confided to them, when acting for it therein, their contracts, express or implied, within the scope of their authority, for legal services, are binding upon the county.

But the charges for such services can be collected in one way only. The account of them must be presented to the board of supervisors of the county, which alone has the power to examine, settle and allow, and to raise the money by tax with which to defray the same. For many of the items of such an account no specific amount is fixed by law, and they must be deemed contingent charges against the county. (*Bright v. Sup. of Chenango*, 18 Johns., 242; *Hilton v. Sup. of Albany*, 12 Wend., 257; *Brady v. Sup. of New York*,

2 Sandf. Sup. Ct., 460.) And when an account is presented for services which are legally chargeable to the county, it is the duty of the board to audit and allow it. How much shall be allowed rests in its discretion, in subservience to established legal rules. (*Id.*) But it must take action, audit and allow the *claim*, when legal, at some amount. And if it does not, where there is no remedy by action, it can be compelled by *mandamus* to proceed so to do. (*People v. Sup. Col. County*, 10 Wend., 363.)

The court has the power to decide whether a rejected claim is a legal claim against the county; and if it be a legal claim, it may instruct and guide the board of supervisors by *mandamus*, in the execution of their duty; not to prescribe for them at what amount the claim shall be allowed (unless indeed the amount is fixed by law); but to compel them to admit that it is a legal claim, and to exercise their discretion as to the amount. (*Hull v. Suprs. Oneida*, 19 Johns., 259; *Wilson v. Suprs. Albany*, 12 id., 416.)

When the board of supervisors has once considered a claim, has once admitted that it is a legal charge against the county, and has in good faith exercised its judgment and discretion upon the amount which should be allowed, a *mandamus* may not issue to compel it to audit anew and allow a greater amount. (*Phœnix v. Suprs. N. Y.*, 1 Hill, 362.)

With these general principles stated, we will proceed to the particulars of the case before us. We have no doubt but that the relator has legal claims against the county which the board of supervisors has denied to be such. The board of supervisors has admitted a general liability of the county to the relator for his services and expenditures in the action against Coan. Although it has admitted a liability of the county to pay for the services in the action against Coan, yet it has rejected entire classes of the items in the relator's account of such services. This rejection was upon the ground that the services represented by those items were not legal charges against the county. It is the same in effect to refuse to audit a certain class of items in an account for various



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kind of services, for the reason alleged that they are not legal charges, as to reject for such reason a whole account, and the rule applies as well, that the court may by *mandamus* direct that action shall be had on a class of items, as on an entire account. It has rejected entirely, and without discrimination, all the items of his charge for services and expenditures in the action against Sackrider. This court, in *Board of Supervisors v. Sackrider* (35 N. Y., 154), held that the action against him was not duly commenced in the court of the justice of the peace, and that the relator did not appear in that court in that action, for the board of commissioners of excise, with sufficient authority. It appeared in that case (and it is admitted in this proceeding), that the authority which he had was a general one, operative in the future without specification, to commence such actions as he saw fit; that there was no meeting or joint action of the board at which it was determined by the board to commence the action against Sackrider; and that none of the commissioners knew of it until after it had been commenced. For this error this court, after two arguments, reversed the judgment of the justice of the peace.

If the board of commissioners of excise had not power, by a general retainer, to authorize the relator to commence actions unspecified, then they had not power by such retainer to bind the county for his services upon such general retainer. For as agents, they could bind their principal only when acting within the scope of their authority. And if the action against Sackrider had gone no farther than the judgment in the County Court, we should hold that the county was not liable for the relator's services therein. But, after the judgment of reversal in the County Court, the board of commissioners of excise, in a formal meeting at which all were present, thus being clothed with authority, adopted and ratified all his acts thus far, assumed the action and benefit of his labors in it, and directed the relator to take the judgment to the General Term of the Supreme Court for review. He thus had a regular and binding retainer, and from that time

forward till the adverse termination of that action in this court, was the attorney and counsel of the plaintiffs therein. And the county was thus made liable to him for his services and necessary expenditures from the commencement until the end.

It is scarcely necessary to say that there is no ground for refusing him payment in the adverse result in the Court of Appeals, which is based upon the error found at the very beginning of the action in the Court of the Justice of the Peace. A question upon which the General Term of the Supreme Court decided in accordance with his view of the law, and upon which this court at one argument stood equally divided, cannot be said to have been ignorantly or negligently considered by him, though the final result was not as he advised it should be.

The different items of his accounts in these two actions may be classified, into those for his services strictly professional, for those not strictly professional, for fees paid to public officers and witnesses, and for other disbursements about the actions.

The relator is entitled to payment for every service which he rendered in these actions as an attorney or counselor at law. By the Code (§ 303) the measure of such compensation is left to the agreement, express or implied, of the parties. There was no express agreement between the relator and the board of commissioners of excise what should be his compensation, if it became a charge against the county. He should be paid, then, what his services were *reasonably worth*. Not according to what they produced to his client, but what such services, in themselves considered, were reasonably worth, looking at the labor, time, talent and skill expended in the bestowal of them.

The services rendered by the relator not strictly professional are comprised in the items of his accounts for the time and travel spent in finding and subpoenaing witnesses. He rendered them by agreement with the board of excise. It was a service essential to success in the actions, and one

which an attorney could render quite as well as another person, but it was not one which required an attorney to perform. He is not entitled to receive for these more than any person of requisite intelligence could have been employed for. And it is for the board of supervisors to judge what that sum is, after consideration of all the circumstances. The board entirely rejected the items for these services in the Coan action. It held them not legal charges.

The fees to be paid to public officers and witnesses are fixed by law, and the relator not being obliged to pay more than legal rates, cannot receive more, and is entitled to receive as much as he paid, up to that rate. (*Hall v. Supervisors N. Y.*, 32 N. Y., 473.) There can be no difficulty in arriving at the exact amount of this class of items.

The remaining class of items are those for expenses and disbursements not ordinarily contained in an attorney's account, because not ordinarily necessary there, being for the hire of conveyances, and expenses of man and beast while traveling in the pursuit of witnesses. These are to be considered in connection with those spoken of above as non-professional services, and they are also included in the agreement with the board of excise. For them both, the relator is entitled to receive as much as, and no more than, the effective performance of the service by any other person could have been procured for. For what a constable or any other competent public or private agent would have well done the same work, with that the relator must be satisfied, and all of that the board of supervisors should be satisfied to give him. This class of items in the accounts in the Coan action the board of supervisors also rejected entirely, considering them not a legal charge against the county.

Treating these accounts in this manner, in our view, it cannot be difficult for the parties to this proceeding to arrive at an accommodation which will be just to both, and which should for that reason be satisfactory to both.

It remains to be seen what power we have through these proceedings to enforce our views, and make them practical in the action of the appellants.

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The immediate origin of this proceeding was an order to the appellants to show cause at a Special Term why an order should not be granted, that an attachment issue, as for contempt, for the violation of a peremptory mandamus theretofore issued, or for such other or further order or relief as the court might think proper to grant. The Special Term properly refused to grant an order for an attachment, and declined also to give order for any other relief. It would seem from the order that the alternative relief there asked for was a reference to determine the amount due. The General Term affirmed the order, so far as it refused an attachment, but taking hold of the clause in the order to show cause looking to alternative relief, modified the order of the Special Term, and awarded a peremptory mandamus. Under such a clause in the notice of motion, or in the order to show cause, relief may be given other than that specifically asked for, and to such extent as is warranted by the facts plainly appearing in the papers on both sides. (*Ferguson v. Jones*, 12 Wend., 241; *Barstow v. Randall*, 5 Hill, 518; *Jackson v. Stiles*, 1 Cowen, 135, and note 1.) And on the appeal to the General Term, it had the right to modify the order of the Special Term, in the respect mentioned in the notice of appeal. (Code, § 330.) The notice of appeal to the General Term in this case was from the whole order of the Special Term, denying any relief to the relator. So the General Term had the right to refuse a reversal of the order, to refuse to grant an attachment, and still the right, modifying the order, to grant relief to the relator. (*Martin v. Kanouse*, 2 Abb., 390.) And now on the appeal to this court, from the order made by the General Term, this court has the same right to modify the order, and to grant such relief as is legal and the facts will warrant. In our view, the General Term erred in its order, not in directing a peremptory mandamus, for an *alias* or *pluries* mandamus may be granted (Tapping on Mandamus, 333, et seq.; Bacon, Ab., title Mand. H., and cases cited; Jacob Law Dict., title Mandamus and Pluries; Angell & Ames on Corporations, chap. 20, § 11);

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but in the terms of the order, and of the mandamus which should follow it. Following the terms of the order, it would command the board of supervisors not only to do, but would specify what they should do. It directs them to allow the relator the bills or accounts rendered in the two actions against Sackrider and Coan, and each and every item of them except those for interest; and it specifies the exact sum (\$697.08) which shall be paid to the relator, and orders that provision be made for the payment of it. In our judgment, this is more than a court can do. It interferes with the discretion of the board of supervisors in a case in which they have a right, to some extent, to exercise a discretion, and as to part of which they have exercised it. The order would have been right, had it directed peremptory mandamus to be issued to the defendants, commanding them to proceed "to examine, settle and allow," the accounts of the relator of all his *charges in the Sackridge case, and certain items of the Coan case*, awarding to him what his services, as attorney and counselor, and in the inquiry for witnesses and subpoenaing them, were reasonably worth; what moneys he had actually necessarily paid, or was necessarily legally liable to pay, for fees to public officers and to witnesses, but not to exceed the rate allowed by law therefor; and for his other necessary disbursements, what they were reasonably worth; holding them all as to their kind, as legally chargeable to the county, but to be examined, settled and allowed by the board of supervisors, with a discretion as to their degree.

The board should have been commanded to allow them all at some rate, to be arrived at in the exercise of proper judgment, upon the facts and circumstances properly shown to the board. And this Court should and will, in the exercise of its power, on review to modify an order, direct that such a mandamus issue. We do this, because all the facts are before us, in the moving papers of the relator, and in the answering affidavits of the defendants, which need be presented for the formation of our opinion.

The original *peremptory* mandamus, has been served, obedience to it has been attempted, and a return made to it. It appears that certain items of the accounts of the relator which we hold to be legally chargeable to the county, have not been settled and allowed by the defendants, but have been wholly rejected, for the reason that the board held them illegal. In other words they have refused to act upon them, as the law requires that they shall act. There is now presented just the case, where the office of a *mandamus* is appropriate; to set in action an inferior body, which declines any action on a legal claim, holding it illegal and refusing action for that alleged reason. (12 and 19 Johns., *supra*.)

The order of the Special Term, and the order of the General Term should be modified, so that an order of the Special Term should be entered, directing that an *alias peremptory mandamus* issue, commanding the board of supervisors of the county of Delaware to examine, settle and allow, the accounts of Stephen C. Johnson for his services and expenditures in the actions of *The Board of Commissioners of Excise of Delaware County v. David Sackrider*, and for his services and expenditures on inquiry for and subpoenaing witnesses in the action of the *Same plaintiffs v. John Coan*, and that they allow him what his services as attorney and counselor at law in the action against Sackrider were reasonably worth, considering the labor, time, talent and skill, expended therein and not confining consideration to the results to the county produced thereby; and that they allow him what his services therein, and in the action against Coan, in the inquiry after and the subpoenaing of witnesses were reasonably worth, considering the time and labor expended therein, and that they allow him any moneys necessarily expended by him or for which he is necessarily legally liable, in the action against Sackrider for the fees of public officers or witnesses, at no greater rate for such fees than is allowed by law therefor; and that they allow him for any other moneys necessarily expended by him, or for which he is necessarily legally liable in and about the prosecution of those actions such amount as the

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subject-matter thereof was reasonably worth; and commanding said board to distinguish between such items and make known such as are allowed, and such as are allowed in part, and such as are disallowed, and such as are disallowed in part; and that the said board, in accordance with the provisions of law, raise the money sufficient to pay the total amount allowed to the relator, and pay the same to him; and that the allowance so made in pursuance of such order be in addition to any former allowance or award made to the relator.

Neither party should have costs in this court against the other.

The Ch. J., and GROVER, J., did not vote, and ANDREWS, J., took no part.

All the other judges concurring, judgment modified as stated in opinion.

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DAVID A. KNAPP, Appellant, v. J. ROMAINÉ BROWN impleaded with ANNA M. JACKSON, respondent.

The issuing of an execution upon a judgment rendered in his favor, after bringing an appeal therefrom, is inconsistent with and a waiver of a party's right to prosecute such appeal.

The plaintiff filed a mechanic's lien upon certain premises leased for a term of years to the defendant B. by the defendant J., by which lease the defendant B. covenanted to make certain alterations, which alterations were made by B., and to secure the payment of which this lien was filed. In an action brought to foreclose the lien, the referee gave judgment for the plaintiff against B. and dismissed the complaint as to J.; plaintiff appealed, but after notice of appeal, issued execution against B., and collected the amount of the judgment from him.—*Held*, That by enforcing the judgment he had waived is right to appeal; *held*, further, that the complaint was properly dismissed as to the defendant J.

(Argued February 23d, 1871, and decided March 21st, 1871.)

APPEAL from a judgment of the General Term of the Court of Common Pleas of the city of New York, affirming

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a judgment entered upon the report of a referee as to one defendant, and dismissing plaintiff's appeal as to the other.

The respondent, Mrs. Jackson, leased certain property in the city of New York to the defendant Brown, for five years, and afterward for two more. By a provision in the lease, the lessee stipulated to make, at his own expense, certain alterations and improvements in the buildings, which were specified in the lease. The lessee, Brown, contracted with the plaintiff, to make certain alterations, and the plaintiff filed a lien under the mechanics' lien law. Subsequently he commenced an action in New York Common Pleas, to foreclose his lien, making Brown and Mrs. Jackson parties.

The action was referred, and on the trial, after the plaintiff had opened his case, the referee dismissed the complaint as to the defendant Jackson, but without costs.

The trial proceeded as against the other defendant, and a judgment was recovered against him for \$966.69, but without costs, except costs before notice of trial, as the defendant, Brown, had offered to allow judgment for \$1,020.31 and interest, before notice of trial. The plaintiff appealed to the Common Pleas General Term, but before the hearing, Brown paid the judgment, upon an execution being issued against him. After hearing the appeal, the court affirmed the judgment as to the defendant Jackson, and dismissed the appeal as to the defendant Brown, with costs. The defendant, Brown, made no objection to the payment of the judgment, and accepted the proposed case and served amendments thereto.

*R. S. Guernsey and John H. Reynolds*, for the appellants, insisted that the collection of the judgment was not a waiver of the right of appeal. (*Dyett v. Pendleton*, 8 Cow., 325; *Clewes v. Dickenson*, 8 Cow., 331; *Higbie v. Westlake*, 14 N. Y., 281; *Burkard v. Babcock*, 27 How., 391.) That defendant's acceptance of case estopped him from objection. (*Lavo v. Graydon*, 14 Abb. P. R., 448; *Persse & B. Paper Works v. Willett*, 14 Abb. P. R., 119; *Strong v. Strong*, 4



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Rob., 621; *Lawrence v. Jones*, 15 Abb. P. R., 110; *Burman v. Tullman*, 28 How. P. R., 483.) That defendant Jackson was liable. (11 Barb., 9; 5 Selden, 440; 12 Abb., 128; § 1, Laws 1863; Code, § 114; 19 N. Y., 242; 31 N. Y., 285; 1 E. D. Smith, 670.)

*S. F. Cowdrey*, for respondent Jackson.

*Cheney & Dixon*, for respondent Brown.

GROVER, J. The issuing of an execution by the appellant upon the judgment rendered in his favor, and the collection of the amount thereof after bringing an appeal therefrom by him, was inconsistent with and a waiver of his right further to prosecute the appeal. By the former he enforced the judgment as a valid judgment and secured to himself the fruits thereof as such. By the latter he seeks wholly to reverse and annul the judgment for error therein. These acts, it is obvious, are wholly inconsistent, the one with the other, and upon principle, it is clear that the same party cannot pursue both. But it is not necessary to examine the question upon principle, it having been conclusively settled by this court. (*Bennett v. Van Sickel*, 18 N. Y., 480.) That was an appeal by a defendant from a judgment containing various provisions, some in his favor and some against him. The defendant, after enforcing the provisions in his own favor, appealed from that part of the judgment which was against him. The court held that inasmuch as the provisions in favor of the defendant were so connected with that part which was against him that the latter could not be reversed without reversing the former, he had waived his right of appeal, and the same was dismissed. In the present case the plaintiff sought by his appeal to reverse the entire judgment after collecting it upon execution issued by him. The counsel for the plaintiff relies upon *Dyett v. Pendleton* (8 Cow., 325), and *Clewes v. Dickinson* (id., 328). These cases are not analogous to the present. In the former, the defendant,

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against whom the judgment was rendered, sued out a writ of error thereon to the Court for the Correction of Errors, but not having put in the requisite bail for staying the collection of the judgment, the plaintiff issued an execution, upon which the defendant gave additional security for its payment; thereupon the defendant in error moved for a dismissal of the writ of error. The court denied the motion, holding that the act of the defendant in error in enforcing the judgment was no bar to the right of the plaintiff in error to prosecute his writ. *Cleaves v. Dickinson* was an appeal by a party from a decree in chancery awarding him a specified sum of money, who had demanded and received payment from the opposite parties and afterward appealed from the decree. A motion to dismiss the appeal was denied by the court. This, at first view, would seem to be an authority favoring the position of the appellant in the present case; but it appears from the opinion of Spencer, Senator, that the appellant did not seek to obtain a reversal of the decree, but its modification, so as to award him a larger sum. It thus appears that in any event he was entitled to retain the sum received, and that the only question that could arise upon the appeal was whether he was not entitled to recover more. Hence his act in demanding and receiving payment of the judgment was not inconsistent with his appeal. The act of the respondent in proposing amendments to the case after the bringing of the appeal did not waive his right to move for its dismissal. He was at liberty to have the case prepared by the plaintiff made conformable to the truth, and not obliged to take the chance of having the case decided upon an incorrect statement should the court refuse to dismiss the appeal. There is nothing before the court showing what items of costs were allowed to the respondent upon the adjustment or any objection of the appellant in respect thereto in the court below. There is, therefore, no question here in relation to the allowance of costs. The order dismissing the appeal as to the respondent Brown must be affirmed with costs. This disposes of the plaintiff's right of recovery as to

both respondents, as it is clear that he can recover, in no event, of Mrs. Jackson any amount beyond the liability of Brown to him. But the plaintiff insists that if the complaint was erroneously dismissed by the referee as to Mrs. Jackson, he was prejudiced in failing to recover costs against her. In this position he is correct. The question as to her liability must, therefore, be examined. From the facts found it appears that Mrs. Jackson was the owner of the premises and leased the same to Brown for a term of years at a specified rent, and that the latter, in addition to the payment of the rent, covenanted with her to make at his own expense certain specified repairs to and altering of the building upon the premises, which were to be left upon the premises by him at the expiration of the term; that Brown employed the plaintiff to furnish the materials for and do the work upon the repairs and alterations. Section 1 of the act of 1863 (p. 859) provides that any person who shall thereafter as contractor, etc., in pursuance of, or in conformity with the terms of any contract with, or employment by the owner, or by, or in accordance with the directions of the owner, or his agent, perform any labor or furnish any materials toward the erection of, or in altering or repairing of any building or buildings in the city of New York, on complying with the sixth section of the act, shall have a lien for the value of such labor and materials upon the house and appurtenances and lot upon which the same shall stand, to the full value of such claim or demand, to the extent of the right, title and interest then existing of the owner of said premises. Mrs. Jackson was the owner of the reversion of the premises and would be entitled to the possession of the same upon the expiration of the term of Brown. By the construction of this section no lien can be created upon the interest of any person as owner of the premises except such person shall either himself or by his agent enter into a contract for doing the work, either express or implied, as the lien is only authorized as against owners so contracting for or employing persons to do the work. That this is the true construction is manifest, not only by the lan-

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guage of the section, but by section 14 of the act. The latter section provides that for the purposes of the act, any person or persons who may have sold or disposed of his or their lands upon an executory contract of purchase contingent upon the erection of buildings thereon, shall be deemed the owner and his vendee the contractor, and said owner shall in all respects be subject to the provisions of the act. This provision was necessary to secure to material men and others to whom such vendor might become indebted in the construction of such buildings the benefit of a lien upon the land; but it would have been unnecessary for this purpose, had the interest of the vendee been subject to the lien created by the act to such persons by virtue of the first section. Section 9 of the act leads to the same conclusion. That section provides that the contractor shall be personally liable to the lienor for the whole amount of his indebtedness, and the owner to the extent of the amount due by him to his contractor. This, although confined to the personal liability of the parties, shows that to authorize the lien there must be an employment by the owner to create any liability against him under the act. In the present case there was no employment of the plaintiffs by Mrs. Jackson. She was in no respect indebted to Brown for or on account of the work. She had conveyed to him an interest in the land in part for the consideration of his doing the work. He alone employed the plaintiff to do the work. He was the owner within the act, and his interest in the premises only is made subject to a lien by the act. This is no hardship upon the plaintiff. He, before entering into the contract, could readily have ascertained the extent of Brown's interest in the premises, and consequently the adequacy of the lien as security. Mrs. Jackson did not appeal from the judgment entered upon the report of the referee. The court could not, therefore, consider the question whether the referee ought not to have awarded her costs upon the dismissal of the complaint as to her, nor is that question before this court. The judgment affirming the judgment dismissing the complaint as to Mrs. Jackson must be affirmed with costs.

## Statement of case.

All the judges concurring, ordered accordingly.

ANDREWS, J., took no part.

EDWARD H. RULOFF, Plaintiff in Error, v. THE PEOPLE,  
Defendants in Error.

If a homicide is committed by one of several persons, in the prosecution of an unlawful purpose or common design, in which the parties have united, and to effect which they have assembled, all are liable to answer criminally for the act; and if such homicide committed within the common purpose is murder, all are guilty of murder.

It is not necessary that the common guilty purpose of resisting to the death any person who should endeavor to apprehend them, must have been formed when the parties went out with the common design of committing larceny, to render all principals in a murder by one of them, perpetrated while making such resistance.

One who is opposing and endeavoring to prevent the consummation of a felony by others may properly use all necessary force for that purpose, and resist all attempts to inflict bodily injury upon himself, and may lawfully detain the felons and hand them over to the officers of the law. Although the use of wanton violence and the infliction of unnecessary injury to the persons of the criminals is not permitted, yet the law will not be astute in searching for such line of demarcation in this respect as will take the innocent citizen, whose property and person are in danger, from its protection, and place his life at the mercy of the felon.

Upon a criminal trial, the presiding judge has no right, in charging the jury, to allude to the fact that the prisoner has not availed himself of the statutory privilege of being a witness in his own behalf; but where such allusion is made, and subsequently, upon his attention being called to it, he states to the jury that there was no law requiring the prisoner to be sworn, and no inference to be drawn against him from the fact of his not being sworn, — *Held*, that this cured the error.

Upon a criminal trial, photographic likenesses, taken after death, of persons whom it is material to identify, may be exhibited to witnesses acquainted with such persons in life, as aids in the identification.

(Argued March 15; decided March 28, 1871.)

ERROR to the General Term of the Supreme Court in the Third department from the judgment of that court affirming the conviction of the plaintiff in error of the crime of murder

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| 125   | 148 |
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| j 150 | 309 |
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| f 164 | 470 |

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Statement of case.

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in the first degree by the Court of Oyer and Terminer in the county of Broome.

The plaintiff in error was indicted and convicted of the murder of Frederick A. Merrick, at Binghamton, on the 17th day of August, 1870. The deceased was a clerk in a store in the city of Binghamton, and, with a fellow-clerk (Burrows), slept in the store. They were awakened, on the night of the homicide, about two o'clock, and discovered three persons in disguise near their bed. These persons had burglariously entered the store, and had placed and tied up in parcels several packages of goods, ready for removal. The clerks got out of bed, and Burrows came into collision with one of the burglars (supposed to be one Davenport), and, after having been struck by him, seized and threw him, and, wrenching from him an iron instrument called by the witnesses a "chisel" or "box opener," struck him on the head, and the deceased, at the call of Burrows, also inflicted a serious blow upon the burglar. This burglar was seriously injured about the head and face, and called to his comrades for help. The associate burglars, who had gone down stairs, came back, the one supposed to be, and who, for identification, will be called Jarvis, somewhat in advance of the third. As they were coming back, the deceased left Davenport and met Jarvis, and they were seen wrestling together. Burrows then left Davenport and went to the head of the stairs to meet the third burglar, who was then coming up, and threw the chisel at him. This third burglar fired two or three shots, one of which splintered the stair-rail or banister, and Burrows, hit by the splinters, supposing he was shot, fell back, and the burglar came up and went to the deceased, who was then clenched with Jarvis leaning over the counter, and, placing one hand on the back of his head or neck, and a pistol within two or three inches of his head, fired a ball into the brain of the deceased, which rendered him unconscious at once, and resulted in his death in a very short time. The burglars escaped from the building and fled.

The tracks of two persons were discovered the next day leading from the rear of the store to the Chenango river, and

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Opinion of the Court, per ALLEN, J.

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a day or two thereafter the bodies of two deceased persons were taken from the river in the immediate vicinity, and evidence was given tending to identify them as the two burglars who were injured in the encounter with the clerks, and as the persons whose tracks were discovered leading to the river. The plaintiff in error was found skulking in the neighborhood, and was arrested a day or two after the commission of the offence, and evidence was given tending to show that he was the third burglar and fired the shot which resulted in the death of Merrick.

Evidence was also given tending to show former intimate relations between the accused and the two deceased persons, and that they had been known to the public, and had intercourse with each other, under different names. With other evidence to identify the drowned persons as individuals intimately connected and associating with the accused, photographic likenesses taken after death were submitted to relatives and acquaintances, who were permitted to give their opinion, as witnesses, as to their identity. Certain burglars' tools and other instruments, found in the desk of the accused in New York, were permitted to be given in evidence on the trial. Several questions were made upon the charge of the judge, which are sufficiently stated in the opinion of the court..

The accused was convicted of murder in the first degree, and the conviction was affirmed, on error, by the Supreme Court.

*George Becker and C. L. Beale*, for plaintiff in error.

*M. B. Champlain*, attorney-general, for defendant in error.

ALLEN. J. The jury have, by their verdict, found that the homicide was committed either by the accused in person or by some one acting in concert with him in the commission of a felony, and in the prosecution and furtherance of a common purpose and design.

It must be assumed, from the finding of the jury, that the prisoner was one of the three persons who burglariously

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Opinion of the Court, per ALLEN, J.

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entered the store on the night of the homicide; that Merrick was killed by one of the burglars, in pursuance of the common intent of all; and that the accused either fired the shot which caused the death, or was present, aiding and abetting his confederates in the commission of the act. The presumption from the evidence, assuming that the witnesses and their statements are credible, as the jury seem to have believed, is, that the accused, in person, committed the homicide; and it is not improbable that, had the jury been left to pronounce upon his guilt or innocence upon that theory alone, without the complications resulting from the submission of the questions touching his responsibility for the acts of any other by whom the deed might have been perpetrated, the result would have been the same. There were but three persons, other than the deceased and his fellow-clerk, present. One of these was disabled and lying upon the floor seriously wounded, and the other was in the grasp of Merrick, the deceased, and was also wounded and injured. The third came up the stairs and fired the pistol which caused the death, and he alone of the three was uninjured and unwounded. The accused, when arrested a day or two after the occurrence, bore no mark of injury upon his person, and could not have been one of the two so badly injured in the encounter with the clerks. It follows, that he was either not present, and has, therefore, been wrongfully convicted, or his hand discharged the pistol which caused the death of Merrick. But the jury may have taken other views of the evidence under the charge, so that the questions made upon the trial and presented by the writ of error, upon the rules governing the liability of one to answer criminally for the acts of others, cannot be passed by without consideration.

If the homicide was committed by one of several persons, in the prosecution of an unlawful purpose or common design, in which the combining parties had united, and for the effecting whereof they had assembled, all were liable to answer criminally for the act, and, if the homicide was murder, all were guilty of murder, assuming that it was within the com-



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Opinion of the Court, per ALLEN, J.

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mon purpose. All present at the time of committing an offence are principals, although only one acts, if they are confederates, and engaged in a common design, of which the offence is a part. (1 Russ. on Crimes, 27, 29.) The several persons concerned in this offence were assembled for the commission of a felony, and were engaged in the actual perpetration of the offence; and the homicide was committed upon one who was opposing them in the act, and in rescuing and aiding the confederates to escape. To this conclusion the jury must have come.

If there was a general resolution against all opposers, and to resist to the utmost all attempts to detain or hold in custody any of the parties, all the persons present when the homicide was committed were equally guilty with him who fired the fatal shot. (1 Russ. on Crimes, 29, 30.) This general resolution of the confederates need not be proved by direct evidence. It may be inferred from circumstances; by the number, aims and behavior of the parties at or before the scene of action. (Id.; Fost., 353, 354; 2 Hawk. P. C., ch. 29, § 8; *Tyler's Case*, 8 C. & P., 616.) There was enough in this case to authorize the submission of the question to the jury. An express resolution against all opposers can very seldom be proved by direct evidence; but here every circumstance tended strongly to prove it.

Some of the confederates, and perhaps all, were armed; they actually did resist all opposition with such weapons as they could successfully use. When one was detained, being overcome by the opposition, the others returned at the call of their comrade, and the only one in condition to do so, deliberately shot Merrick, who was preventing the escape of one of the confederates, and was cautioned by that confederate, when about to shoot, not to shoot him. The jury were authorized to infer that this act was within the general purpose of the confederates. They may have desisted from their larcenous attempts, and yet the full purpose of the combination not have been carried out so long as one of the party was detained and held a prisoner.

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Opinion of the Court, per ALLEN, J.

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The charge of the judge was favorable to the accused upon this branch of the case, quite as favorable as the law would warrant. It was in substance that if the shot that caused the death was fired by another hand than that of the prisoner, the jury must be satisfied that there was an actual and overt concert and complicity to effect that precise object. Again, the judge charged, in response to a request of the prisoner's counsel, that the jury must be satisfied that the prisoner had fired the fatal shot which produced the death of Merrick, or that he (that is, the person actually shooting) was acting under the influence of a purpose common to all, for the promotion of a bad cause, that the others were co-conspirators with him, and that they had the same object in view, and that the same purpose actuated the breasts of all, before they could find the prisoner guilty of murder; and the same was in substance repeated in another part of the charge. Having charged thus fully and favorably to the prisoner, it was not error to decline to repeat the instructions at the close of the charge. But a charge in the terms of the request would have been improper. The request was to charge that the common guilty purpose of resisting to the death any person who might endeavor to apprehend them, must have been formed when the parties went out with a common illegal purpose of larceny. The time when the illegal combination and arrangement was made, which resulted in murder, is not material, so long as it was made before the actual commission of the offence. They may have only had a larceny in their minds when they left New York, the other intent may have been formed after they reached Binghamton, or after they entered upon the premises.

After the judge had charged, as before stated, and in response to the requests of the prisoner's counsel, had charged, 1st. That to authorize a conviction for murder in the first degree, the shot must have been fired with a premeditated design to take life, and not simply to rescue his companion. 2d. That if all the person who fired the shot, did, was intended to render help, and to rescue his endangered companion, and

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Opinion of the Court, per ALLEN, J.

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not simply to kill, there could be no conviction of murder; and, 3d. That if the acts of Merrick, and the circumstances as they transpired and which were referred to in detail, and the situation and condition of the confederates, and the desire to avoid detection and arrest of any of the burglars, or their death at the hands of Merrick, aroused and heated the blood of the one who fired the fatal shot, the prisoner could not be convicted of murder; he was asked to charge, that if the prisoner and his companions, on the occasion of the homicide, entered upon the premises with the common purpose of larceny, and the violence of the prisoner's companion was merely the result of the situation in which he found himself, and that he proceeded from the impulse of the moment without any concert, then the prisoner would be entitled to an acquittal and discharge.

He had in various forms charged this proposition in substance, and had gone to the very verge of the law in favor of the accused, and explained the principles upon which, and upon which alone he could be convicted of murder, for the acts of his companions and confederates, and he was not called upon to repeat the instructions in as many forms, and with all the varieties of diction that counsel could devise. Having once distinctly, and without ambiguity, enumerated the legal propositions, it was not error to decline a repetition. We are not called upon to decide whether the prisoner was entitled to rulings as favorable as those given. Be this as it may, the judge was not bound to adopt the words of the counsel, having stated the proposition substantially as stated. (*First Baptist Church in Brooklyn v. Brooklyn Fire Insurance Company*, 28 N. Y., 153); *Fay v. O'Neill*, 36 N. Y., 11.)

The claim pressed with most earnestness in behalf of the plaintiff in error, is that the offence was reduced to manslaughter in the second degree, as having been committed in resisting an attempt of the deceased to commit a felony, the attempted felony, as claimed, being the unnecessary killing of one of the burglars, by Merrick and his fellow clerk.

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The statute declares, that every person who shall unnecessarily kill another, while resisting an attempt of such other person to commit any felony, or to do any other unlawful act, shall be deemed guilty of manslaughter in the second degree. (2 R. S., 661, § 11). The prisoner claims that the killing of Merrick was within the provisions of this act. That the prisoner and his confederates, were engaged in the commission of a felony, and that the deceased could lawfully use all the force necessary, to oppose and prevent the consummation of the felony, could properly resist all attempts to inflict bodily injury upon himself, and could lawfully detain the felons, and hand them over to the officers of the law, for prosecution and punishment, is not denied, and it would only be by the use of unnecessary or wanton violence and the infliction of unnecessary or wanton injury to the person of the criminals, that the deceased could become a wrongdoer. Without undertaking to define the boundary line which separates the lawful and authorized, from the unauthorized and illegal acts of individuals in the protection of property, the prevention of crime and the arrest of offenders, it is enough that the law will not be astute in searching for such a line of demarcation, as will take the innocent citizen, whose property and person are in danger, from the protection of the law, and place his life at the mercy and discretion of the admitted felon. They will not be made to change places upon any doubtful or uncertain state of facts.

The prisoner's counsel requested the judge, to charge the jury, that if the killing of Merrick was necessary, in order to prevent him from unnecessarily killing another, it was not murder in the first degree. This request was properly declined. There was no evidence to warrant the submission of the question to the jury. The claim upon the argument was, that the burglar who was first seized by Burrows, and struck and severely injured, both by him and the deceased, was in danger of being killed at the time of the homicide, and that it was to save the life of this man, that the deceased was killed. But the evidence is, that both Merrick and Burrows had left

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this burglar, before either of the others returned to the rescue, and that neither was then harming or attempting to harm him. It could not have been, then, to prevent the unnecessary killing of that man, that the life of the deceased was taken. At the time of the homicide, the deceased was struggling with the second burglar and having him at some advantage, but there is no evidence that he was doing or attempting to do him any bodily harm, or that the burglar was in danger of bodily harm from the deceased, who made the first attack, or that the deceased was doing anything except to defend himself, or possibly to detain the man in custody and prevent his escape, does not appear. The killing was deliberate, and for some purpose other than the prevention of a felony by the deceased. A verdict that the killing was to prevent the commission of a felony, or the unnecessary killing of the person then struggling with the deceased would have been unsupported by evidence. There was no error in the refusal to charge as requested.

A question is presented by the exception to the comments of the judge upon the fact that the prisoner had not availed himself of the privilege of being sworn and giving evidence in his own behalf. By statute (ch. 678 of the Laws of 1869) persons upon trial for crime may, at their own request, but not otherwise, be deemed competent witnesses. The act may be regarded as of doubtful propriety, and many regard it as unwise, and as subjecting a person on trial to a severe if not cruel test. If sworn, his testimony will be treated as of but little value, will be subjected to those tests which detract from the weight of evidence given under peculiar inducements to pervert the truth when the truth would be unfavorable, and he will, under the law as now understood and interpreted, be subjected to the cross-examination of the prosecuting officer, and made to testify to any and all matters relevant to the issue, or his own credibility and character, and under pretence of impeaching him as a witness, all the incidents of his life brought to bear with great force against him. He will be examined under the embarrassments incident to

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his position, depriving him of his self-possession and necessarily greatly interfering with his capacity to do himself and the truth justice, if he is really desirous to speak the truth. These embarrassments will more seriously affect the innocent than the guilty and hardened in crime. Discreet counsel will hesitate before advising a client charged with high crimes to be a witness for himself, under all the disadvantages surrounding him. If, with this statute in force, the fact that he is not sworn can be used against him, and suspicion be made to assume the form and have the force of evidence, and circumstances, however slightly tending to prove guilt, be made conclusive evidence of the fact, then the individual is morally coerced, although not actually compelled to be a witness against himself. The constitution, which protects a party accused of crime from being a witness against himself, will be practically abrogated.

The Legislature foresaw some of the evils and dangers that might result from the passage of this act, and did what could be done to prevent them by enacting that the neglect or refusal of the accused to testify should not create a presumption against him. Neither the prosecuting officer or the judge has the right to allude to the fact that a person has not availed himself of this statute, and it would be the duty of the court promptly to interrupt a prosecuting counsel who should so far forget himself and the duties of his office as to attempt to make use of the fact in any way to the prejudice of a person on trial. An allusion by the judge to the fact, unexplained, cannot but be prejudicial to a person on trial, and a provision intended for his benefit will prove a trap and a snare. It is an intimation to the jury of the effect upon his mind of the omission of the accused to explain by his own oath, suspicious and doubtful facts and circumstances, as affecting the question of guilt or innocence.

The judge alluded to the fact that the accused was not sworn, twice in the course of his charge; once in connection with the question of identity and the narration of the circumstances of the homicide, and again in connection with the

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Opinion of the Court, per ALLEN, J.

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circumstances claimed to be suspicious, as tending to prove the presence of the prisoner at the burglary, and his connection with the other supposed burglars, and on both occasions in a manner calculated to give an impression prejudicial to the prisoner. An impression was given that at least full effect should be given to the evidence of identity, and to the narration of the transaction as given by the sole surviving witness, and to the circumstances tending to prove the connection of the accused with the offence, inasmuch as he had not contradicted the former or explained the latter. It is true the judge told the jury that the prisoner was not bound to be sworn, and that the prosecution must make out their case, but he did not say in that connection that his omission to be a witness should not create any presumption against him. Had not this been subsequently, and, upon an exception being taken, explained, it would have been a just ground of complaint by the prisoner. But the judge, upon his attention being called to his remarks, did say to the jury that there was no law requiring the prisoner to be sworn, and there was no inference to be drawn against him from the fact of his not being sworn. Inasmuch as the error of this part of the charge was that by its general terms it authorized an inference to the prejudice of the prisoner, rather than a direct statement of an erroneous proposition, we are of the opinion that the error was cured by the subsequent explanation.

The charge as given would seem to indicate that the circumstances relied upon as proving the guilt of the prisoner, had, in the mind of the judge, been entitled to additional weight as evidence, from the fact that the prisoner had not been sworn, and from it the jury might have been misled and induced to regard the fact that he had not been sworn as one circumstance against him, and as giving point and effect to all the others. But this was explained and the rule properly stated upon the final submission of the cause to the jury.

Objection was made, upon the trial, to the production in evidence of certain implements and papers found in the room and desk of the prisoner. Both the room and desk were used

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somewhat in common by him and one of his associates, but he was the chief occupant. The articles were taken some time after his arrest, and evidence was given tending to show that he had the key of the room, and showing how the room had been kept during his absence; and the prisoner, upon the trial, admitted the possession of one of the implements. Other evidence was given; also tending to connect the prisoner with the articles found in his room; and the question of fact was properly submitted to the jury as to the connection of the prisoner with these articles, upon all the evidence. There was evidence to go to the jury upon that question. The ratchet-drill, which, it was claimed, the bits with which the entry into the store was effected fitted, the prisoner admitted on the trial had been in his possession as a new invention and a curious thing. This alone was some evidence that the articles found with the drill were there while the prisoner occupied the room and used the desk, especially with the other evidence tending to show that the room had remained locked from the time he left until the articles were found and taken away.

Objection was also taken to the admission of the photographic likenesses of the two persons found drowned. Evidence was given of the manner in, and disadvantageous circumstances under which they were taken; and the evidence was that they were not artistic pictures, nor in all respects the most perfect likenesses that could be taken. This was fully explained by the artist, and the reasons why they were not more perfect, stated. They were submitted to the witnesses, not as themselves, and alone, sufficient to enable them to identify the persons with entire certainty, but as aids, and with other evidence, to enable the jury to pass upon the question of identity. They were the best portraits that could be had, and all that could be taken. The persons were identified by other circumstances, the clothes they wore and the articles found upon their persons, and their general description; and the photographs were competent, although slight, evidence in addition to the other and more reliable testimony. We are



## Statement of case.

of the opinion that it was not error, under the circumstances, to admit them as evidence for what they were worth. By themselves, they would have been of but little value; but they were of some value as corroborating the other evidence identifying the bodies.

There was no error of substance committed upon the trial; and the judgment must be affirmed, and the proceedings remitted to the court below, to proceed upon the conviction and pronounce sentence of death as prescribed by law.

All the judges concurring, judgment affirmed.

CALEB A. BURGESS, Respondent, v. THOMAS H. SIMONSON  
AND OTHERS, Appellants.

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It is the right and duty of the General Term of the Supreme Court, on appeal to it, in the proper mode, to determine, upon an examination of all the evidence, whether the controverted facts have been correctly found, but where evidence is given, showing some material thing to be probably true, and the fact is so found, in this court it must be assumed to have been correctly found, irrespective of all rebutting evidence of however great strength or weight.

In an action to set aside a conveyance of real estate, as fraudulent, brought by the judgment creditor of the grantor against the grantee, the judgment is conclusive evidence of the debt against such grantee, although his grant is prior to the judgment and testimony to disprove the existence of such a debt, offered by him is inadmissible.

Upon the bringing in of a new defendant, pending the trial, a stipulation that the testimony already taken in the case, may stand as against the new party, "subject to *all* legal exceptions as to its admissibility," secures to him the benefit of such exceptions only as have been already taken, and such as he shall thereafter actually take *during the trial*.

(Argued March 20th, and decided March 28th, 1871.)

APPEAL from a judgment of the Supreme Court in the late Second judicial district, affirming a judgment for the plaintiff on the report of a referee. The action was brought to set aside a conveyance of certain real estate in Brooklyn, by Thomas H. Simonson to Miriam Simonson, on the second of

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Statement of case.

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November, 1857, as fraudulent against the creditors of Thomas.

For some time prior to November, 1857, the defendant Thomas H. Simonson was the owner of certain real estate in the city of Brooklyn, consisting of houses and lots, and one unimproved lot. The houses were old, having been built, for the most part, prior to 1847. The property, at the time stated, was incumbered by mortgages to the amount of \$29,000, and some \$800 interest.

On the second day of November, 1857, Thomas H. Simonson was indebted to his sister Miriam Ann Simonson for \$1,000, which had been loaned by her to him some years previously, and for which she held his promissory note, payable one day after date, and on which there was interest accrued.

This property was sold on that day to Miriam Ann by her brother, subject to the incumbrances, for the amount of such promissory note and interest due thereon. The interest of Thomas H. Simonson in the property was alone sold. His wife did not join in the conveyance, nor was there any release of her dower as an incident or consideration of the sale.

The referee finds the total consideration of this sale to be over \$31,000.

The consideration of the conveyance, viz.: The promissory note of \$1,000 and the interest due thereon, was surrendered up to Thomas H. Simonson by Miriam Ann at the time of the execution of the deed.

At the time of the conveyance, all the mortgages were due, and last one of \$10,000 was about being foreclosed. Directions had already been given to commence the foreclosure proceedings.

The owner of the \$10,000 mortgage, after a careful examination of the value of the property, and after full enquiries as to its value, was fearful of bringing his foreclosure proceedings to a sale, lest he should have to buy the property, and extended the time of the payment of his mortgage for a year, upon application on behalf of Miriam Ann Simonson,

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and upon condition that the back interest on the other mortgages should be paid forthwith, and which was paid in a few days thereafter.

During all the year 1858, no sale of any portion of this property was effected, and none was made till February, 1859.

As the sales were subsequently made, the proceeds were applied to the interest on the mortgages and to the reduction of the principal. The Dwight mortgage was paid in installments from sales of the property as they were made from time to time, and so also was the \$8,000 mortgage, and the other one reduced to \$5,000.

Thomas H. Simonson was embarrassed at the time of his conveyance.

The deed to Miriam was put on record in February, 1858. In 1861, the plaintiff commenced his action against Simonson & Gallup, and recovered judgment against that firm, of which Thomas H. Simonson was a member, March, 1862. He brought this action to set Miriam's conveyance aside on the ground that the same was made to hinder and delay him in the collection of his debt, and introduced evidence tending to show that the property was worth from \$38,000 to \$40,000, if there was a clear title.

Miriam died before the trial, and, upon the application of the plaintiff, her heirs, except Charles Simonson, were substituted. The trial then proceeded, and most of the testimony was taken, when it was discovered that Charles Simonson, one of the heirs of Miriam, had not been made a party, and he was brought in. His counsel then stipulated that the evidence theretofore taken might be used against him, subject, however, to all legal exceptions to its admissibility. Several of the objections to the testimony, taken before he was brought in, were argued by his counsel in this court, upon grounds not specified when the objections were taken.

Evidence was offered during the trial, on behalf of the heirs of Miriam, to show that the debt of the plaintiff had no existence; and this was excluded.

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Opinion of the Court, per GROVER, J.

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It was strongly urged, upon the part of the defendants—the referee having placed his findings upon the inadequacy of price—that there was not sufficient evidence to support this finding.

*Samuel Hand*, for the appellants.

*Amasa J. Parker*, for the respondent.

GROVER, J. The facts found by the referee fully sustain his legal conclusions. It is insisted by the counsel for the appellant that some of the material facts so found were not shown by any evidence, and hence a legal error was committed by the referee in so finding, which may be corrected by this court. If the counsel is correct in his premises, he is in his conclusion. The rule upon this subject has been so often stated that it is hardly necessary to reiterate it. That rule is that it is a legal error to find a material fact unsupported by any evidence, but that when such evidence is given, showing the probable truth of the fact, it must be assumed by this court to have been correctly found, irrespective of any rebutting evidence given by the opposite party, no matter what the weight of such rebutting evidence may be. This results from the consideration that no appeal upon questions of fact can be taken to this court, only in certain excepted cases, within which the present does not come. An appeal both upon the law and fact may be taken to the General Term of the Supreme Court in the mode furnished by the Code, and hence it follows that that court has not only the power, but that it is its duty to determine whether the controverted fact was correctly found, by an examination of all the evidence. Applying to the present case the rule adopted by this court, it is impossible to conclude that the referee committed a legal error in finding any of the facts. That the grantor was in failing circumstances at the time of the conveyance was fully proved. That the grantee was aware of this fact was shown by her testimony taken upon the supplemental proceedings

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Opinion of the Court, per GROVER, J.

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against the grantor. That the conveyance was made upon an inadequate consideration was supported by the fact that all that was paid, or agreed to be paid, by the grantee was about eleven hundred dollars, which was paid by surrendering up to the grantor his note for that amount, which she had held for some years, for which she received a conveyance of real estate which, from testimony given by the plaintiff, the referee was authorized to find was worth forty thousand dollars, subject to incumbrances of about thirty thousand. That the witness may have been influenced in estimating the value of the real estate at the time of the conveyance by its subsequent rise, is entitled to no weight in this court. That the conveyance was made with intent to hinder, delay and defraud creditors, was an inference not only from the preceding facts, but was further sustained by the proof that the grantee was the sister of the grantor. That the grantor, subsequent to the conveyance, actively interposed in negotiating for an extension of a mortgage upon the real estate then due, and that the grantee, upon a subsequent sale of a parcel of the real estate, received in part payment therefor from the purchaser, a note of \$2,000 held by him against the grantor and his former partner, which the evidence tended strongly to show was worthless. Several exceptions were taken by the appellant to the rulings of the referee as to the admissibility of evidence, but the grounds of objection were not specified so as to make the exceptions available. I have, however, examined them, and none to which exception was taken was erroneous. The testimony given by the grantor and grantee upon the supplemental proceedings against the former, was admissible against each, and to this extent only was it offered and received. The judgment recovered by the plaintiff against the grantor was conclusive evidence of his indebtedness in this action in the absence of any fraud, and therefore the evidence offered to controvert the existence of the debt was properly rejected. The statement of the grantor as to the amount of rents received, was competent evidence as to the value of the real estate as against him, and it was competent

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for the witness, who had made an entry by his direction upon his books of such amount at the time of the statement, to testify from such entry. There was no objection made to his using a copy of such entry, made by him from the books, instead of the books themselves, and no question arises therefore in respect to this. The reservation made in the stipulation of Charles Simonson, upon his being substituted as a party defendant, that the evidence previously taken should be received as to him, subject to all legal exceptions, secured to him the benefit of such exceptions only as had been taken thereto, and such as should be thereafter taken by him during the trial. The judgment appealed from must be affirmed with costs.

All the judges concurring except ALLEN, J., who did not sit.

Judgment affirmed.

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NELSON ROWE, Respondent, v. CYRENE SMITH, Appellant.

At common law, the liability of the husband for the trespasses of cattle, damage feasant, belonging to the wife at the time of marriage, and straying from her land did not rest upon the ground of his responsibility for her torts. ANDREWS, J.

Although the statutes of this State in regard to married women have not affected the liability of the husband for the torts of his wife, based as that is upon his presumed dominion and control over her person and acts, the statute of 1860, declaring that any married woman "may sue and be sued in all matters relating to her separate property, in the same manner as if she were sole," authorizes an action against her alone for damages done by the straying of her cattle from her own premises upon adjoining lands, notwithstanding her husband and children reside with her upon the lands, and both the land and cattle are used for the support of the family.

(Argued March 17; decided March 28, 1871.)

APPEAL by the defendant, a married woman, from the judgment of the late General Term of the Supreme Court in the

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sixth judicial district, affirming (BALCOM, P. J., dissenting) the judgment of the Cortland County Court, affirming the judgment of a justice of the peace for the plaintiff.

The action was trespass, to recover for the straying of the defendant's horses and cattle from her own upon the plaintiff's ground and doing damage there. The answer, among other things, alleged that the defendant was a married woman, and her husband should have been joined as a party.

It appeared that the plaintiff's land adjoined the defendant's land, and the trespasses were committed during the summer of 1867. The other facts are sufficiently stated in the opinion.

*Hoyt & Smith*, for the appellant, cited *Marsh v. Potter* (30 Barb., 506); *Matthews v. Fiestel* (2 E. D. Smith, 90), *Horton v. Payne* (27 How., 674); *Wagner v. Bell* (19 Barb., 321); *Klein v. Hentz* (2 Duer, 633); *Beach v. Ranney* (2 Hill, 309); *Starkweather v. Gaul* (44 Barb., 98); *Board of Excise v. Keller* (20 How., 280). They also cited cases with reference to the general rules governing the interpretation of statutes.

*Ballard & Warren*, for the respondent, cited, on the questions noticed in the opinion, *Porter v. Mount* (45 Barb., 425); *Peak v. Lemon* (1 Lansing, 299); *Gillies v. Lent* (2 Abb., N. S., 455); *Barton v. Beer* (35 Barb., 81); *Tonawanda R. R. v. Munger* (5 Denio); *S. C.* (4 Comst., 349); *Sendner v. Sahler* (51 Barb., 322).

ANDREWS J. The determination of this appeal depends upon the construction to be given to the act of March 20th, 1860, "concerning the rights and liabilities of husband and wife." (Laws of 1860, ch. 90.)

It appears that the defendant after her marriage, acquired title to certain real estate in the county of Cortland, and to certain personal property, including horses and cattle, and that at the time of the commission of the trespasses for which this action was brought, she resided with her husband and

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children upon the land, and the personal property was used in connection with the real estate for the support of the family.

It appeared from the evidence that the personal property was acquired by the labor and services of the wife after marriage, but whether before or after 1860, does not expressly appear. It is to be assumed, however, that it was held by her as her sole and separate property under the act referred to, as the defendant claimed title to it upon the trial, and the case was tried upon that assumption.

The injuries for which the action was brought were sustained by the escape of the horses and cattle of the defendant from her premises upon the land of the plaintiff.

At common law the husband would have been solely liable. In the absence of any trust, he acquired by the marriage the right to the use during their joint lives, of the real estate which the wife then owned, or which she might thereafter acquire, and the absolute title to her chattels, and he was entitled to the proceeds of her labor.

The liability of the husband in such case, would not rest upon the ground that he was responsible for the torts of his wife, but upon the fact that he was in the possession of the real estate and the owner of the cattle by which the trespasses were committed, and was bound to control them so that they should not trespass upon the premises of others.

The law in general imposes upon the owner of such animals, this duty as incident to, and as one of the responsibilities attached to the ownership. (*Tonawanda R. R. Co. v. Munger*, 5 Den., 255; Hilliard on Torts, vol. 2, p. 82.)

The recent legislation in this State, has wholly changed the common law, in respect to the rights of the husband in the real estate of the wife during coverture, and to personal property acquired by her labor on her sole and separate account.

The husband has no longer any right to the use of the real estate, or to the possession of her personal property thus acquired.



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The statute declares that it shall remain her sole and separate property, and shall not be subject to the interference or control of her husband. (Laws, 1860, ch. 90, § 1.) If, therefore, the husband was liable, solely or jointly, with his wife, for the injuries of which the plaintiff complains, the ground of that liability must be found in the general principle that the husband is liable for the torts of the wife. The theory upon which this liability proceeds is, that the marriage subjects the person of the wife to the dominion and control of her husband, so that the commission of a tort by her is, in a degree, at least, the result of his fault or omission.

The recent statutes leave unaffected this liability of the husband for the strictly personal torts of the wife.

But we are of opinion that, by the statute of 1860, she is made solely responsible for the injury in this case. The eighth section of the statute declares that "any married woman may, while married, sue and be sued, in all matters having relation to her sole and separate property, \* \* \* in the same manner as if she were sole."

It is true that the action in this case does not relate to the title or the possession of property owned or claimed by her as her separate estate; but it is, nevertheless, founded upon a violation of the duty imposed upon the owner of domestic animals to keep them from straying upon and injuring the premises of another.

The maxim, *sic utere*, etc., suggests the ground of obligation in such case.

If the defendant should permit a nuisance upon her premises, to the injury of her neighbor, would she not be liable in an action for the injury? The unlawful use permitted by her of her separate estate, in the case supposed, would make the action one relating to her separate estate; and, in this case, the violation of the duty incident to the ownership of the property has, we think, the same result, and brings the action within the intendment of the statute.

A construction, which would exclude it, would be, we think, narrow and inconvenient, separating the ownership of property

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from the incidents which properly attend it; and to make the husband liable, when all control of the property has been taken from him, would not accord with the principle upon which his liability for the torts of the wife is founded.

These considerations lead to an affirmance of the judgment.

Ch. J., and GROVER, RAPALLO, and FOLGER, JJ., concur; ALLEN, J., dissents; PECKHAM, J., not voting.

Judgment affirmed.

### THE BROOKLYN PARK COMMISSIONERS, Respondents v. JAMES ARMSTRONG, Appellant.

In the exercise of the right of eminent domain, the legislature are the sole judges to what extent the public use requires the extinguishment of the owner's title, and their power in this respect (subject always to the necessity of making full compensation) is not limited by any constitutional restriction. The nature of the right acquired by the public in such cases, whether an absolute title to, or a mere easement in the lands, depends, therefore, upon the intention of the legislature, to be deduced from the act authorizing the condemnation.

A municipal corporation, was, by an act of the legislature, authorized to take lands for a public park, and the act declares, that the lands so to be taken, shall be a public place; and provides that in ascertaining the compensation to be paid the owners, a just and true estimate of the value of the lands is to be made, together with the tenements, hereditaments and appurtenances, privileges and advantages to the same belonging, without deduction for benefits and advantages; and declares that on fulfilling the requirements of the act, the lands shall vest forever in the city, and that whenever the city shall become vested with the title to the park, as provided, it might sell any building improvements or other material thereon; and authorizes the issue of bonds by the city, to obtain the fund to pay for the lands taken, declaring the lands pledged for the payment of such bonds.—*Held*, that the city acquired an absolute estate in the lands taken under this act and not an easement, and that such title was free from any legally recognizable reversionary right in the owners.

The title of the city, thus acquired, is impressed with a trust to hold the lands for the public use as a park, and it cannot, of itself, convey or dispose of them in contravention of the trust; but it is within the power of

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the legislature to relieve the city from such trust, and to authorize a sale, free therefrom.

The right to discontinue the public use of land thus taken and to sell it to private parties, under the sanction of the legislature, exists, notwithstanding the fact that such abandonment and sale, will lessen the value of surrounding property, which has been assessed for the benefit and advantage to it, from the maintenance of such use. There is no contract in such cases, with the owner of such adjacent property to maintain the use.

Bonds having been issued and used to raise funds for the compensation paid for the land.—*Held*, that the terms of the act and the issue of the bonds, constituted a contract between the bondholder of the one part, and the city and the State on the other, specifically pledging the land taken for the payment of the bonds, and that a subsequent act of the legislature, authorizing a sale of any portion of the park free of all liens existing by virtue of the original act, was in violation of the federal constitution, as impairing the obligation of contracts.

*Held*, further, that a provision that the avails of the sales so authorized, should be held as a sinking fund, for the redemption of the bonds when due, did not avoid the objection.

If a purchaser may sometimes be compelled to take a title, free from reasonable doubt, notwithstanding an objection not certainly and beyond all possible question unfounded; yet when it is ascertained that there is a defect, he may refuse, however remote the probability of his ever being incommoded thereby.

(Argued March 16th, and decided March 28th, 1871.)

APPEAL from a judgment of the General Term of the Supreme Court in the Second department, rendered in favor of the plaintiffs, in a controversy submitted under section 372 of the Code.

The plaintiffs representing the city of Brooklyn, acquired by the right of eminent domain, a certain tract of land in that city for a public park. They sold one lot of the tract to the defendant, who refused to take the title, on the ground that the city had not the power to convey a clear title in fee, free from all incumbrances; and this action was brought as a test case to try the title.

By an act of the Legislature (chap. 466, Laws of 1859), John Greenwood and others were appointed commissioners to select and locate grounds for a park, in or adjacent to the city of Brooklyn, and to report to the next Legislature.

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They made their selection and reported to the Legislature of 1860, which passed an act (ch. 488, Laws of 1860), amended in 1861 (chap. 340), by which a board of park commissioners was appointed, and a tract of land lying on both sides of Flatbush avenue, was declared from and after the passage of the act, to be deemed to have been taken by the city for public use, as and for a public park, and to have been opened as a public place, with the same effect as if the whole of the same had been taken and declared open under the provisions of the charter of the city (ch. 144, Laws of 1850), except as otherwise provided by the act.

Commissioners of estimate and assessment were to be appointed by the Supreme Court, in the manner provided by the act relative to Fort Green (ch. 142, Laws of 1847), who were directed to "make just and true estimate of the value of the lands, and of the loss and damage to the respective owners, lessees, parties and persons respectively entitled thereto, or interested in the same, together with the tenements, hereditaments and appurtenances, privileges or advantages to the same belonging, or in anywise appertaining, by and in consequence of relinquishing the same to the said city" (§ 4), which amounts were to be due and payable immediately upon the confirmation of the report. (§ 6.)

The report was declared to be final and conclusive upon the city, the owners and all other persons, "and upon the confirmation of any such report, and upon payment being made to the owners of the lands in such report mentioned, or upon their assent thereto by deed duly executed, the said lands" were to "vest forever in the city of Brooklyn, for the use and purposes in this act mentioned." (§ 8.)

Bonds of the city were to be issued to pay the awards, and the lands taken by virtue of the act were specifically pledged for their payment (§§ 10 and 12), and bonds subsequently issued are still outstanding and unredeemed.

In 1865 an act was passed (ch. 603), entitled "An act to change the boundaries of Prospect Park in the city of Brooklyn," authorizing the commissioners to acquire, for the pur-

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poses therein mentioned, an oval shaped piece of land for an entrance to the park. (§ 1.)

It provided that this land, as well as all other lands mentioned in the act of 1861, should, "from and after the passage of this act, be deemed to have been taken by the city as and for a public park, and the commissioners' map shall be altered to correspond therewith." (§ 2.)

Commissioners were to be appointed, as before, to estimate the value of this land, "and also all the estate, right, title and interest in all other lands heretofore taken by the act of 1861, remaining in the owners thereof, and the loss and damages to be sustained by them in consequence of their relinquishing the same to the city." (§ 3.)

"And the title of the lands mentioned in (their) such report shall, after such confirmation, vest forever in fee simple absolute in the said city of Brooklyn, and the said lands shall thenceforth form part of Prospect Park." (§ 5.)

For the payment of the awards and the redemption of the bonds issued under this act and the act of 1861, "all the lands embraced within the boundaries of the said park, including those now taken, are hereby specifically pledged." (§ 6.)

That part of the land lying east of Flatbush avenue was never used or improved as a park.

In 1870 an act was passed (chap. 373) entitled "An act to authorize the improvement and sale of certain portions of Prospect Park, in the city of Brooklyn." It authorized the commissioners, for and in behalf of the city, to sell the land east of Flatbush avenue (§ 1), by deeds, with or without warranty, which deeds should vest in the grantees an absolute title in fee simple. (§ 2.)

The proceeds of sales to be devoted to the sinking fund for the redemption of park bonds. (§ 3.)

After deeds are given, "all liens, rights and claims by way of easement or otherwise into, over or upon the lands, arising out of or founded upon an act passed May 2d, 1861, entitled, &c., or of any act amendatory thereof, shall be terminated and extinguished." (§ 4.)

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The case states that this act was passed "in order to furnish a better and more satisfactory security for said bonds."

In pursuance of this act the commissioners sold one lot to the defendant, who refuses to take the title, alleging that the act is unconstitutional, and that neither the city nor the commissioners can give a valid title to the fee, free from all incumbrance.

*Samuel Hand* and *William W. Goodrich*, for the appellant, that the city did not acquire an alienable fee under the act of 1861, cited: (*Albany street*, 11 Wend., 151; *John and Cherry Streets*, 19 Wend., 659; *Varick v. Smith*, 5 Paige, 137; *Bloodgood v. Mohawk R. R.*, 14 Wend., 51; *Dunham v. Williams*, 36 Barb., 162; *Hooker v. Turnpike Co.*, 12 Wend., 371; *Wilkinson v. Leland*, 2 Peters, 657; *Embury v. Conner*, 3 Comst., 511; *Beekman v. Saratoga R. R. Co.*, 3 Paige, 73; *Cincinnati v. Lessees of White*, 6 Pet., 438; *Trustees of Watertown, v. Cowen*, 4 Paige, 510; *Dumond v. Sharts*, 2 Paige, 184; *Jackson v. Hathaway*, 15 Johns., 453; *Hains v. Elliott*, 10 Pet., 25; *Mahon v. N. Y. C. R. R.*, 24 N. Y., 66; *People v. Kerr*; 27 N. Y., 188; *Anderson v. Rochester R. R. Co.*, 9 How., 553; *Townsend v. Morris Co.*, 6 Trans. Appls., 269.) That the act of 1870, in authorizing a sale clear of incumbrances, impaired, or attempted to impair the contract with the bondholders as to the security, they cited *Trustees of the Wabash Canal Co. v. Beers* (2 Black., 448). That the city having assessed adjacent owners to the park on the increased value of their lands from the benefits of the park, it could not now lessen the value by abandoning and selling the park, and that they were estopped from so doing, having filed maps showing the park, and thereby induced purchases of adjacent lands. They also cited cases as to the unconstitutionality of the act of 1865, but the question was not passed upon by the court.

*Joshua M. Van Cott* and *Henry C. Murphy*, for the respondents. That the estate taken by the city, under the act

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of 1861, was an absolute fee and alienable by the consent of the legislature, they cited: (*Heyward v. The Mayor, etc.*, 7 N. Y. R., 314; *Rexford v. Knight*, 11 N. Y., 314; *Dingley v. The City of Boston*, 100 Mass. R., 544; *De Varaigne v. Fox*, 2 Blatch., 95; *Embury v. Conner*, 3 Comst., 511; *Matter of Water Com'rs v. Lawrence*, 3 Edw., Ch. R., 552; *In re Townsend*, 39 N. Y., 171; *Nicoll v. N. Y. & Erie R. R.*, 12 N. Y., 121; *Wardell v. People*, 8 Wend., 183; *Gould v. Hud. R. R. Co.*, 6 N. Y., 522; *Darlington v. The Mayor*, 31 N. Y., 164, 193; *East Hartford v. Hartford Bridge Co.*, 10 How. U. S., 511

FOLGER, J. The act of 1861 conferred upon the city of Brooklyn the power of acquiring a right in the lands in question in this case. By the proceedings under the act, the city did, in fact, obtain all the interest and title which, by the terms of the law, it was empowered to acquire. The just compensation to the private owner was awarded; the award was confirmed by judicial authority; the sum of it paid to him, and by him accepted. His acceptance was a renunciation of the constitutional provision made for his benefit, and an assent to the taking of the land, even if there were any question as to the validity of the act, or any irregularity in the proceedings under it. (*Embury v. Conner*, 3 N. Y., 511-518.) But, neither by such renunciation, nor without it by proceedings under the statute, could the city obtain a right more extensive than it was authorized by the statute to acquire. The act of the owner, in accepting the awarded compensation, could not be made broader than the provisions of the law to which he thereby assented; nor could the city, by proceedings under it, reach a title greater than it conferred the power of acquiring. From the interpretation of the statute itself, then, must be found the extent of the right of the city in the lands taken.

The main object of the act is to provide for the city of Brooklyn, its people and the public, a park. Lands taken for such purpose are taken for a public use. (*Owners, etc.*, v.

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*Mayor, etc., Albany*, 15 Wend., 374.) But, in the idea of a public park is comprehended more, than a use, either occasional or limited by years, or susceptible of coexistence with a private right capable of concurrent exercise. The words suggest more, than an open extensive area of land, to be passed over or but temporarily occupied by the public, and on which any private person may still do acts of ownership. To create a public park an extensive area is needed; but the area must be improved, and in various processes, alterative and subversive of natural formation, must much money be absorbed, and many years must go by before it is complete. And so costly, so extensive, so peculiar in character, and so undisturbed by interference, must be these processes and the results of them, as that there is need of permanency and exclusiveness of public possession and control, as against the exercise of any private right therein. Of itself then, the power to take lands for a public park, unless limited by the terms in which it is given, would, to a large degree, carry with it the right to acquire the largest title in the lands taken. That the extent of the right acquired in lands by the taking of them for public use depends, in some measure, upon the needs for which they are taken; is recognized and applied in this court, in *The People v. Kerr* (27 N. Y., 288-201, *et seq.*); see, also, *Heyward v. The Mayor, etc., of New York* (7 id, 314-325).

This, of itself, however, is not conclusive. But, when we advert to the terms in which the power given by this act is expressed, we find that the city is authorized to take title to the lands themselves. They are declared "to be a public place" (§ 1); "to be deemed to be taken for public use, as and for a public park" (§ 2); in ascertaining the just compensation to be paid to the private owner, "a just and true estimate of the *value of the lands* is to be made, and of the loss and damage to the respective owners, together *with the tenements, hereditaments and appurtenances, privileges and advantages to the same belonging*, by and in consequence of *relinquishing the same* to the city, without deduction for any supposed benefits or advantages" (§ 5); on fulfilling the require-



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ments of the act, "*the lands shall vest forever in the city*" (§ 8); "whenever the city shall have become *vested with the title to said park*, as in the act provided, it *may sell any buildings*, improvements or other materials not required for the purposes of the park or for public use" (§ 20); the city is authorized to issue bonds to obtain the moneys to pay for the lands taken, and *the lands are*, by the act, *pledged for the payment* of those bonds (§§ 9, 12). The terms employed in the fifth section, descriptive of what is to be acquired and paid for, are broad, and would seem to include all of a proprietary nature in the lands, or connected with or growing out of them. And for relinquishing it all, the owner is to be paid the full value of it all, without deduction. It seems inconsistent, that if the legislature intended that the city should take but an easement, it should be required to pay the value of the lands, and of all hereditaments and appurtenances, and also the other loss and damage to the owner from the taking, without deduction for benefit. This would be to exact the price of the fee, for taking a user only. It could not have been intended that the owner should receive full value, and yet have left to him a reversionary interest. (*Haldeman v. The Penn. Cent. R. R. Co.*, 50 Penn. St., 425-437; *Cooley on Lim. Leg. Pow.*, 552.)

The power given, to sell buildings improvements and materials not needed for the public use, is one not consistent with the idea of an easement merely, a restricted right of user only. So the phrases which vest the lands and the title to the park forever in the city, are creative of a right, not limited by time or particular use, and are indeed essential to make operative the pledge of the lands to the creditor of the city holding these bonds. It would be entirely nugatory to pledge to a creditor an easement, a right of public use, which would expire the instant that by the enforcement of the pledge he had cut off the public use, extinguished the general easement, and made it so far as possible, his private and exclusive property. The legislature meant to give the creditor a lien upon these lands. That this could not be done, unless the

city, the debtor, had more than a right of public use in them, draws strongly to the conclusion that the legislature gave the power to acquire a title.

Language may be broad enough to vest an absolute title to lands, without being technical in its terms. If the expressions are such as that the whole force of them is not applied, unless a fee simple is created, that estate will be taken, though the exact words be not used. Thus, in *Rexford v. Knight* (11 N. Y., 308), it was held that the State had acquired an estate in fee in certain lands. It was said on the argument of the case now at bar, that the statute under which the lands in that case were taken, gave in express terms, the fee simple to the State. It is true that chap. 262, § 3, of Laws of 1817, and § 52, 1 R. S., 226, are thus explicit. But the claim in that case (*N. Hill, Jr.*, for the respondent, *arguendo*, page 311), was put upon the provisions of § 49, 1 R. S., 226, and so was the judgment of the court. (Pp. 312, 314.) The language of the section last referred to, is: "And the premises so appropriated *shall be deemed the property of the State.*" And the court, says: "The language employed is so broad, as to require a fee simple." So in *Dingley v. The City of Boston* (100 Mass., 544), an authority to "purchase or otherwise take lands," and a declaration that "the title to all lands so taken should vest in the city," was held to vest a title in fee simple in the defendants. See also *The Commonwealth v. McAlister* (2 Watts, 190); *Union Canal Co. v. Young* (1 Whart., 425); 50 Penn. St., *supra*. When the fee is taken from the former owner, it must be held, that he is fully compensated at the time of the original taking, and that the possibility that the land may at any future time revert to him by the cessation of the public use, is too remote and contingent to be considered as property at all. (*Heyward v. The Mayor, supra.*)

Having determined that the act of 1861 conferred upon the city the power of acquiring an absolute estate in the lands, it is not necessary that we go into the inquiry whether the statute of 1865 be a valid act or not.

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Opinion of the Court, per FOLGER, J.

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It is to be observed that the act of 1861 vested the lands in the city of Brooklyn forever, but for the uses and purposes in that act mentioned. Though the city took the title to the lands by this provision, it took it for the public use as a park, and held it in trust for that purpose. Of course, taking the title, had it taken it also free from such trust, it could have sold and conveyed it away, when and as it chose. Receiving the title in trust for an especial public use, it could not convey without the sanction of the legislature; and the act of 1870 expresses the legislative sanction. Under its provisions (Laws of 1870, ch. 373, p. 848), it is authorized to sell and convey, with covenants, certain portions of the lands taken (§ 1), of which the premises in question in this case are a part. It was within the power of the legislature to relieve the city from the trust to hold it for a use only, and to authorize it to sell and convey. (*Nicoll v. New York & Erie R. R.*, 2 Kern., 121.) Doubtless, in most cases, when land is condemned for a special purpose, on the score of public utility, the sequestration is limited to that particular use. But this is where the property is not taken, but the use only. Then, the right of the public being limited to the use, when the use ceases the right ceases. Where the property is taken, the owner paid its true value, and the title vested in the public, it owns the whole property, and not merely the use; and, though the particular use may be abandoned, the right to the property remains. The property is still held in trust for the public by the authorities. By legislative sanction it may be sold, be changed in its character from realty to personalty, and the avails be devoted to general or special public purposes. (*De Varaigne v. Fox*, 2 Blatchf. C. C., 95.)

The appellant's counsel insists that the operation of the acts of 1861, and of 1870, in the practical result, is to take the property of one person and transfer it for the profit of the city to another. Such is not, however, the direct and necessary, nor was it the intended or anticipated, operation of the act of 1861. That was passed in good faith by the legislature, to meet a public necessity. The authority to determine upon

the necessity of the exercise of the power of taking private property for public use rests with the State. It ordinarily acts in this matter through the legislative department of the government. The legislature is the proper body to determine the necessity of the exercise of the power, and the extent to which the exercise of it shall be carried. And there is no restraint upon the power, save that requiring that compensation shall be made. (*The People v. Smith*, 21 N. Y., 597.)

When the legislature has indicated the existence of what is acknowledged to be a public use; has declared the necessity of the taking for that use, and its extent; has restricted the taking to the extent declared; and has provided for the ascertaining and the due payment of just compensation, the judicial power may not question its decision. It is only when the limits have been exceeded, or its authority has been abused or perverted, that the judiciary may restrain. (*Hazen v. Essex Co.*, 12 Cush., 477.)

That the legislature erred, in 1861, in the exercise of this power, and mistook a seeming for a real necessity, does not render its further action in 1870 invalid. Under the act of 1861, all the steps were taken for the appropriation of the lands and the payment therefor. At once, on the appropriation, the owner became entitled to the compensation for them. His right to the price was complete. (*The People v. Hayden*, 6 Hill, 359.)

And the rights were reciprocal. The public had the right to the lands on making payment, and as soon as the owner was paid he was disseised. There is no reverter. They were the property of the city of Brooklyn. The legislature could discharge it from the trust to hold them for a park, and empower it to sell. It has done so, and, so far as any express limitation in our State constitution is concerned, it had the power to do so.

The appellant claims, that the city is estopped by its own acts from selling any part of the land; that the plotting and filing of maps made a *quasi* contract between the city and the bondholders and individuals that the whole land should

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Opinion of the Court, per FOLGER, J.

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always be a park ; and that the value of neighboring property having been enhanced in anticipation of the creation of this park, and greater assessments and taxes upon that property having thereby been made and paid, such taxation is in the nature of a contract, and the city cannot now sell any of its land. We apprehend that this point is not well taken.

If a street be discontinued and the value of lands abutting on other parts of it, and on neighboring streets is lessened, it is not such an injury to the owner as to entitle him to damages. (*Smith v. City of Boston*, 7 Cush., 254.)

The city of Brooklyn was not the grantor of the neighboring owner, and did not induce him to buy of it, by a purpose declared, of creating this park. Any enhanced value of his property, was an incidental benefit to him, in its greater readiness of sale, at a greater price, and any depreciation in value, is an incidental detriment. The same results flow, in greater or less degree, from the commencement or abandonment of any of the measures of municipal enterprise whether general or local. It would be going too far, to hold, in the absence of any direct and particular relation between the city and the owner of real estate, that a projected work having influenced for the better the value of his property, he could forbid the abandonment of it, or that there existed any enforceable right, if it was abandoned.

Any proper exercise of governmental power which does not directly encroach upon the property of an individual, or disturb him in its possession or enjoyment, will not entitle him to compensation, or give him a right of action. (*Gould v. Hud. R. R. R.*, 6 N. Y., 522.) Hence no obligation rests upon the government not to exercise its power in such manner. Familiar examples of this, are the changes of the grades of streets in cities and villages, by which lands adjoining are lessened in value. (*Radcliff v. The Mayor*, 4 N. Y., 195 ; *Wilson, v. The Mayor*, 1 Denio, 595.) The general good is to prevail over partial individual inconvenience. (*Lansing v. Smith*, 8 Cow., 149.) This is the rule when public works for the general welfare are entered into. It is not

different when works projected are, for the general good, abandoned before completion or commencement.

This act of 1870 directs that the moneys received upon such sale shall be paid over to the commissioners of the sinking fund of the city, to be held for the redemption of the bonds issued in payment of the lands taken. (§ 3). And, further, that upon the delivery of the deeds on such sale, all liens existing by virtue of the act of 1861, shall be terminated and extinguished. (§ 4.)

It is claimed, by the appellant, that the enactment contained in the fourth section is in conflict, with the federal Constitution, in that it impairs the obligation of the contract by which these lands are pledged for the payment of the bonds issued for the lands taken. (U. S. Const., art. 10, § 1, sub. 1.)

The legislature when it declared, in the act of 1861, that these lands were pledged for the payment of these bonds, did thereby agree with whoever parted with his money and took a bond, that he should have, as an assurance for the payment of it, the security of these lands. It was not merely a restriction upon the power of the city. It was an obligation creating a lien. It agreed with the creditor, itself, and fastened upon the city the same agreement, that for the money received from him he should have these particular lands as a specific security for repayment. If section 4 of the act of 1870 is a valid enactment, it takes away from the holder of these bonds part of the security which he has for their payment. It is no answer to this to say that there is still pledged to him the land reserved for streets, avenues, or other purposes. Such reply is only as to the degree, and not as to the fact, of the impairing the obligation. It is no answer to say that the avails of the sale will be turned into the sinking fund for the use of the bondholders. The holder of the bond did not agree to take a security upon a fund in the city treasury, and incur any risk of its preservation, but stipulated for a specific lien upon this land. (See *Curran v. State of Arkansas*, *infra*, p. 319)

Nor is there here any application of the reserved power of the legislature to alter or amend the charter of the city. This

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Opinion of the Court, per FOLGER, J.

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is a contract not between the city and the State, but between the creditor of the one part and the city and the State of the other. No power has been reserved, either in constitution or otherwise, to alter that contract.

That it was an important matter to have these lands pledged for the payment of these bonds, is sufficiently shown by the solemnity with which the pledge is made, an enactment of the legislature being sought to so specifically declare it. It is an essential element in the obligation of the city, which the creditor received in exchange for his money. This act takes that element away and thus impairs the obligation. True the entire contract is not destroyed. The liability to pay still remains. But the pledge of tangible property as a security that the liability would be met has been withdrawn. It was on the assurance that this should remain, that the creditor was induced to take the bonds, and give in exchange his property. This was a contract. The security cannot now be taken away without impairing the obligation of that contract. (*Curran v. The State of Arkansas*, 15 How., U. S., 304-314; *McGee v. Mathis*, 4 Wallace, 143; *Wabash, &c. Co. v. Beers*, 2 Black, 448.)

It follows that the act of 1870, so far as it assumes to discharge the lands from the lien, is in conflict with the constitution of the United States. The parts of the statute not obnoxious to this objection may be upheld. But as the provisions of the law which discharges the lien are those upon which it is relied to remove the encumbrance upon the premises, and as, without them, the city cannot give such a title as the act authorizes it to pass, and as the purchaser has agreed for, they are of no avail to the respondents in this controversy.

It is true that the danger to the purchaser, to all seeming, is very slight, and very remote, that the premises for which he has contracted will ever be called upon to contribute to the payment of these bonds. The probabilities are, that with the wealth concentrated within the corporate bounds of the city of Brooklyn, and with the means at its command, it will always find the ordinary means of raising money by taxation,

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Opinion of the Court, per FOLGER, J.

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sufficient for the purpose of payment of interest, and the method of a new loan at any time available to pay the principal. But yet there is the possibility. The debt is an encumbrance upon this land, and does affect that for which the appellant bargained. This is a legal certainty. However strong the probability that the debt will never be exacted from the land, it cannot be asserted to be more than a probability. While it exists there is, as matter of law and matter of fact, the possibility that the creditor may enforce his lien. And this hampers the estate. It may be conceded that a title free from reasonable doubt may be forced upon an unwilling purchaser. Thus, in a case in which it appeared that there was in a prior deed, a reservation of mines, specific performance was decreed, not because there being mines it was not probable that the right reserved would ever be exercised, but because, 1st. The court saw upon examination the probability was great that there were no mines for the right reserved to act upon. 2d. That all legal right to exercise it had ceased. But this is a doubt whether there exists, in law or in fact, any defect in the title. When it is ascertained that there is an existing defect in the title, the purchaser will not be compelled to perform on the allegation that it is doubtful whether the defect will ever incommode him. If there be any reasonable chance that some third person may raise a question against the owner of the estate after the completion of the contract, the court considers this a circumstance which renders the bargain a hard one for the purchaser, and one which it will not, in the exercise of its discretion, compel him to execute. (*Seaman v. Varodrey*, 16 Vesey, 390.) We are not able to hold that a good title in fee to the premises, can be acquired by the respondent, under and by virtue of the acts, proceedings and sale.

The judgment of the courts below must be reversed, with costs to the respondent.

All the judges concurring.

Judgment reversed and judgment ordered for the defendant.



Statement of case.

BOARD OF EXCISE OF ONTARIO COUNTY, Respondent, v. LEMAN B. GARLINGHOUSE, Appellant.

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PETER S. BONESTEEL and others, the Board of Commissioners of Excise of Ontario county, Respondents, v. LEMAN B. GARLINGHOUSE, Appellant.

THE SAME v. THE SAME.

THE SAME v. THE SAME.

THE SAME v. THE SAME.

The county commissioners of excise under the excise act of 1857 are superseded by the town commissioners authorized by the excise act of 1870, and are by that act removed from office and deprived not only of the power to grant licenses, but to prosecute for penalties or perform any other duty as commissioners.

Actions for penalties commenced by the county commissioners before the passage of the act of 1870 are not thereby abated, but may be continued by the town commissioners, who may be substituted as their successors in office within their respective localities; and, until such substitution, the action will proceed in the name of the original parties.

(Argued March 21; decided March 28, 1871.)

APPEAL from an order of the General Term of the Supreme Court of the Fourth department, affirming an order of the Special Term denying a motion "to set aside and dismiss the (above mentioned) causes." Other facts sufficiently appear in the opinion of the court.

*George F. Danforth*, for the appellant, cited *Brown v. Osborn* (2 Cow., 457); *Butler v. Palmer* (1 Hill, 324); *Smith v. Banker* (3 How. Pr., 142); *Moore v. Westervelt* (3 Sandf., 762, 765); *Harrington v. Trustees of Rochester* (11 Wend., 547).

*E. G. Lapham*, for the respondents (after objecting that the Supreme Court had no power to grant the relief, and, therefore,

properly denied the motion), upon the merits, cited *Pruyn v. Tyler* (18 How., 331); *Van Rensselaer v. Secor* (32 Barb., 469); *Berly v. Runpacher* (5 Duer, 183); Dwarris on Statutes, 676; *Butler v. Palmer* (1 Hill, 375); *Coms. of Excise v. Harvey* (39 How., 191); *Coms. of Excise v. Willey* (35 Law Jour., 175).

CHURCH, Ch. J. This is an appeal from an order denying motion to dismiss and set aside the above causes made on the ground that the plaintiffs cannot prosecute the same by reason of their removal from office, by virtue of the excise act of 1870. The actions were commenced before the passage of that act. One of them is pending in the Supreme Court. In the others, judgments have been obtained in the justice's court, one of which is pending on appeal in the County Court, one has been affirmed in the County Court and Supreme Court, and in the other two, the appeal to the County Court has been dismissed, and on appeal to the Supreme Court, the order of dismissal affirmed. The papers do not disclose the precise condition of the cases at the time of the passage of the act of 1870, and it is unnecessary to distinguish between them for the purpose of determining the effect which the defendant's construction of that act would have upon judgments previously rendered or to determine whether the appeal is properly brought in all the cases. We prefer to pass upon the merits of the question involved, viz: What effect the act of 1870 had upon the county commissioners authorized to be appointed by the excise act of 1857.

We think that the county commissioners under the act of 1857 were superseded by the commissioners authorized to be appointed by the act of 1870, and were, by virtue of that act, removed from office not only as it respects their powers to grant licenses, but to prosecute for penalties or to perform any other duty as commissioners of excise. These statutes must be construed in *pari materia* by virtue of the sixth section of the act of 1870, which provides that the provisions of the act of 1857 "except where the same are inconsistent

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Opinion of the Court, per CHURCH, Ch. J.

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or in conflict with the provisions of this act, shall be taken and construed as *a part of this act* and be and remain in full force and effect throughout the whole of this State."

The provisions of the act of 1870, relating to the appointment of excise officers, are manifestly inconsistent with similar provisions in the act of 1857. The mode of selection and appointment, their tenure and compensation, are different, and yet they are substantially the same officers, except that those appointed under the act of 1870, are restricted in jurisdiction to the cities, villages and towns for which they are respectively appointed. Excise officers have always existed in the State, and certain general powers and duties have been performed by them, which are well understood and would be recognized by reference to the name of the office itself. Besides the principal duty of such officers, that of granting licenses, is expressly conferred upon the excise boards appointed by the act of 1870. The principal purpose of the act of 1870, seems to have been to change the excise boards from county boards to town, village and city boards, so that each locality would be assured of that personal knowledge, supervision and vigilance, deemed to be indispensable to the proper discharge of the important duties committed to their charge, in determining the proper persons to whom licenses should be granted, as well as the circumstances justifying the exercise of that power. Similar considerations are equally applicable to the duties of discovering and prosecuting infractions of the law. County boards in the discharge of both classes of duties, would necessarily be obliged to rely upon the information and representation of others, while the local officers could ascertain the fact for themselves, or at least verify the correctness of information by others, by personal observation and inquiry. It is not to be presumed that the legislature intended to duplicate this class of officers, and without any apparent reason, but against the plainly indicated theory of the act provide for two sets of officers, one to grant licenses and the other to prosecute for penalties. To find such an intention would require the clearest expression of language. Actions are

authorized by public officers in matters growing out of their public duties in a great variety of cases, but the appointment or existence of public officers for the sole purpose of instituting legal proceedings in civil cases has no precedent in this State. It is therefore very clear that the excise boards authorized by the act of 1870 were intended to be substituted for those authorized by the act of 1857.

It has been suggested that prosecutions for penalties by county commissioners are not inconsistent with the act of 1870, for the reason that the power of granting licenses is specifically conferred upon the local boards by that act, while the power to prosecute for penalties is not, and therefore that this latter power may be exercised by the county commissioners. This position is untenable. Both powers are specifically conferred. All the provisions of the act of 1857, relating to the appointment of county commissioners, are, as we have seen, repealed. They are out of the act. There are no such officers and no power to appoint any. The provisions of the act of 1870, relating to the appointment of local boards are substituted. All provisions of the act of 1857, not inconsistent with the act of 1870, are retained, and are as effectually and legally as much a part of the latter as if they had been copied into it and re-enacted. They are expressly made "a part of this act." Striking from the act of 1857 the provisions in relation to the appointment of county commissioners, and inserting those of the act of 1870, on the same subject, and reading the unrepealed portions of the act of 1857, in connection with such substitution, and the meaning is perfectly plain. Such unrepealed portions of the act of 1857 as designates "commissioners of excise," or "boards of commissioners of excise," would then refer and apply to the commissioners or boards authorized by the act of 1870. The penalties in the act of 1857 are not repealed; nor is the twenty-second section of that act repealed. It reads as follows: "The penalties imposed by this act, except the penalties provided by sections eight, fifteen and nineteen, shall be sued

for and recovered in the name of the board of commissioners of excise," etc. What board? Manifestly the board authorized by the act of 1870, the provisions in relation to which occupy the place of the original provisions on that subject in the act of 1857. The difficulty on this subject has, I think, arisen from not properly blending the two statutes, and reading them as one. The power to grant licenses is no more expressly conferred upon the new boards by the act of 1870 than the power to prosecute for penalties, when both acts are consolidated and read together. The former might have been specifically conferred in the act of 1870, from a necessity expressly to restrict the jurisdiction of the local boards to the locality for which they are appointed, or to insert some modification of the terms or manner upon or in which licenses should be granted, or it might have been deemed appropriate to specify in terms the principal powers and duties of the officers therein authorized to be appointed. Whatever the object or necessity, or want of necessity, the construction of the two acts now in force, when united on this point, is not doubtful. The new boards having express authority to sue for penalties, it follows that the old boards have not.

These views are deemed appropriate in giving a construction to this statute, but are perhaps not necessarily essential to the question involved in these motions. These actions were commenced before the passage of the act of 1870, and they were properly commenced in the name of the county commissioners, and there is nothing in the act of 1870 inconsistent with their continued prosecution in the name of the county board. The Revised Statutes (§ 14, title 1, ch. 7, part 3) has provided for all such cases. It provides in substance that actions prosecuted by public officers shall not abate by their death or removal, but may be continued by their successors, who shall be substituted for that purpose by the court. I have no doubt that the new boards of excise are the successors of the old boards, within the locations for which they are respectively appointed, within the meaning of the statute.

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Until such substitution, the actions may proceed in the name of the original parties. (10 N. Y., 164; 2 Denio, 125.)

The order must be affirmed.

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HENRY YOUNGS et al., Executors, etc., Respondents, v. MARIA YOUNGS et al., Appellants.

Lands were specifically devised to J. for life, and on his death to his children. By the residuary clause of the will, all the "rest, residue and remainder of the testator's property and estate, real and personal, whatsoever and wheresoever situated, and not therein and thereby specifically devised or bequeathed, he gave, devised and bequeathed" to certain residuary devisees and legatees. J. having died unmarried in the lifetime of the testator, — *Held*, that the lands in which a life estate was devised to him, passed under the will to the residuary devisees, and not to the heirs-at-law.

*Dash v. Van Kleeck* (20 Wend., 458) explained and distinguished.

Under the Revised Statutes (2 R. S., 57, § 5), changing the common-law rule, a will whose introductory clause expresses a desire to make a suitable disposition of such worldly property and estate as the testator shall *leave behind him*, the residuary devise expressly devising all his real estate not before specifically devised, carries all after-acquired lands belonging to the testator at the time of his death.

Where the testator charges the payment of his debts upon certain specified real estate, and, if that shall prove insufficient, then upon his other real estate, — *Held*, as between the legatees and the devisees, the personal estate was exonerated from the debts.

(Argued March 27; decided April 4, 1871.)

APPEAL from the General Term of the Supreme Court, in the First judicial department, affirming the judgment of Special Term.

This action was commenced to obtain a judicial construction of a will. The testator died, seized of a large real estate; he also was possessed of considerable personal property, and was indebted to a considerable amount. He left no wife or descendants surviving him, but numerous collateral heirs. He devised considerable real estate, in every case giving a life estate to the first taker, with remainder in fee to the issue of such first

## Statement of case.

taker. He set apart certain real property for the payment of his debts, giving the fee to such of his executors as should qualify, in trust for that purpose. He was the owner, at the time of his death, of real property not mentioned in his will, and acquired after the execution of such will. The testator devised certain real property respectively to two nephews, John and Gideon, during their natural lives, the fee to their surviving issue. These nephews died intestate and unmarried, several years before the testator. The will was carefully and elaborately drawn containing twenty-six clauses. By the last clause the testator gave to certain relatives "all the rest, residue and remainder of my estate, real and personal, whatsoever, and wheresoever situate, not therein and thereby specifically devised or bequeathed." It was held at Special Term, 1. That the residuary devisees were entitled to the lands which the testator devised to the two nephews John and Gideon respectively, or their children or other issue surviving them respectively. 2. That they were entitled to the land acquired by the testator after the execution of his will. 3. That the primary fund for the payment of debts, was the proceeds of the land devised for that purpose, and if those proceeds proved insufficient, then the balance was to be charged upon the other real estate designated by the testator for that purpose. The judgment of the Special Term was afterward affirmed by the General Term.

*Cyrus Lawton and A. J. Rogers*, for appellants. Lands devised to the two nephews, passed to the heirs at law. (*Doe dem Morris v. Underdown*, Willes R., 293, 296, 297; *James v. James*, 4 Paige, 115; 6 Paige, 600; 20 Wend., 457; *Green v. Dennis*, 6 Conn., 293.) Any estate that by lapse, omission, accident or mistake, remains undisposed of, belongs to the heirs-at-law. (*Devon v. Mellor*, 5 Term., 558, 563, 564; *Lynes v. Townsend*, 33 N. Y., 561, 562, and cases cited; *Saylor v. Plaine*, 1 Amer. Reports, 34; 31 Md., 156; *Doe v. Weatherby*, 11 East, 323, 332, 333; 2 Barb., Ch. 102; *Atkyns v. Atkyns*, Cowper, 808, 811.)

## Statement of case.

*E. G. Drake, Jr.*, for guardian *ad litem*, of infants, appellants, on the question of the exoneration of the personal property from the payment of debts, cited, *Hill on Trustees*, 4th Amer. ed., 350, marg. p.; 2 *Williams on Exec.*, 5th Amer. ed., 1541, 1545 marg. p.; 1 *White & Tudor's Lead. Cases*, 3d Amer. ed., 505, marg. p.; 49 *Law Lib.*, N. S.; 2 *White & Tudor's Lead. Cases*, 3d Amer. ed., 56 marg. p.; 45 *Law Lib.* N. S.

*Marshal S. Bidwell*, for residuary devisees, respondents. It is proper, in order to discover the testator's intent, to refer to the introductory words in the will. (*Earl v. Grim.*, 1 Johns., Ch., 494; *Ibbottson v. Beckwith*, *Ca. tem. Talbot*, 157, 160, 161; *Doe d. Penwarden v. Gilbert*, 6 Moore, 268; 3 Brod. & Bing., 85; *Grayson v. Atkinson*, 1 Wils. 33-9; *Charter v. Otis*, 41 Barb., 529, 531; 36 N. Y., 231.) Every intendment is to be made against holding a man to die intestate, who sits down to dispose of the residue of his property. (*Booth v. Booth*, 4 Ves., 407; *Boyle v. Hamilton*, 4 Ves., 437, 439; *Phillips v. Chamberlain*, 4 Ves., 51, 59; *Wadley v. North*, 3 Ves. 367; *Bird v. Hunsdon*, 2 Swans., 345, 346; *Morrall v. Sutton*, 1 Phill. Ch., 537; *Kingsland v. Rapelye*, 3 Edw., 1; *Reeves v. Reeves*, 1 Dev. Eq., 386, 388; 2 Rop. on Leg. 1461; 2 Red. on Wills, 116; Ward on Leg., 11, 12; 2 Law Lib. N. S.) The devise over to John's children, the testator knowing he was unmarried, was a contingent remainder. (*Purefroy v. Rogers*, 3 Sand., 380; *Baker v. Lorillard*, 4 Comst., 265; Hayes on Real Estate, 82; *Egerton v. Massy*, 3 C. B. N. S., 345.) The will not providing for the contingency of John's death without issue surviving, and the law gives the property on the happening of that contingency to the residuary devisee. (2 Powell on Dev., by Jarm., 106; 1 Jarm., 4 Am. Ed., 590-591; *Doe d. Wells v. Scott*, 3 Mau. & Sel., 300; *Cholmondeley v. Weatherby*, 11 East., 322; *Moreton v. Fassick*, 1 B. & Adol., 186; *Chester v. Chester*, 3 P. Wms., 56; *Wheeler v. Walroone*, Aleyn, 28; *Willows v. Lydcot*, 2 Ventr., 85; *Stephens v. Stephens*, *Ca. tem.*, Tal-



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Opinion of the Court, per GROVER, J.

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bot, 228, 233; *Doe d. Morris v. Underwood*, Willes R., 293; *Rident v. Pain*, 3 Atk., 486; *Egerton v. Massey*, 3 C. B. N. S., 338; *Glover v. Spendlove*, 4 B. C. C., 337; *Hayden v. Stoughton*, 5 Pick'g., 528; *Brigham v. Chadwick*, 10 Pick'g., 306, 309; *Austin v. Cambridgeport*, 21 Pick'g., 215, 224; *Bowers v. Smith*, 10 Paige R., 202; *Craig v. Craig*, 3 Barb., Ch. R., 101, 102.

GROVER, J. Section 5, 2 R. S., 57, provides that every will that shall be made by a testator, in express terms, of all his real estate or in any other terms denoting his intent to devise all his real property, shall be construed to pass all the real estate which he was entitled to devise at the time of his death. This changes the common law rule, that a will operates only upon real estate owned by the testator at the time of making the same, the title to which he retained to the time of his decease, and substitutes therefor a more reasonable rule, that when it appears from the will that it was the intention of the testator to dispose of all the real estate owned by him at the time of his death, his will should be effectual for that purpose. The residuary clause expressly disposes of all the testator's real estate not before specifically disposed of. This brings the case within the statute rule. Again, in ascertaining the intention of the testator, the introductory clause of the will may be considered. (*Earl v. Grim*, 1 Johns. Chan., 494.) In this case, the testator in that clause, after referring to the uncertainty of human life, says: "And desirous of making a suitable disposition of such worldly property, and estate as I shall leave behind me, have thought proper to make," &c., his last will and testament. This clearly indicates the intention of the testator to make the will speak at the time of his death and to dispose thereby of such property as he might at that time own, whether real or personal. Upon either ground, the disposition of such real estate as he acquired after making the will is devised thereby by virtue of the statute, the same as that owned by him at the time. *Lynes v. Townsend* (33, N. Y., 558) is not in conflict with this position. The only point

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Opinion of the Court, per GROVER, J.

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determined in that case was, that an expression in the clause appointing executors, that he appointed them for the full and final settlement of his estate, whether real or personal, did not indicate an intention that the will should operate upon after-acquired real estate. The testator devised to John Young, an estate for his life in certain specified real estate, and from and after his death, he gave the same in fee to his children. He gave a like estate to Gideon Young, and gave the same in fee after his death to his children. Both John and Gideon died in the lifetime of the testator, leaving no surviving issue. The question is, whether the heirs of the testator take this land on the ground that it was not disposed of by the will, or whether the devisees take the same under the residuary clause of the will. This must be determined by the intention of the testator, manifested by the will. The position of the counsel of the appellant, that the heirs take all the real estate of the testator that he has not devised to others, is correct. This results from the law declaring them entitled thereto, in default of such disposition. The residuary clause is as follows: "All the rest, residue and remainder of my property and estate, real and personal, whatsoever and wheresoever situate and not herein and hereby specifically devised or bequeathed, I give, devise and bequeath" to the persons named therein. The counsel for the appellant insist that the lands devised to John and Gideon are not embraced in this clause, for the reason that the testator must have presumed that he had already disposed of the fee therein. To sustain this position the counsel cite *James v. James* (4 Paige 115); *Van Kleeck v. The Dutch Church* (6 Paige 600); *same case* (20 Wend., 458); *Greene v. Dennis* (6 Conn., 292). The point determined in *James v. James* gives no support to the counsel's position. That point was, that when a testator devised to his wife a house and lot in lieu of dower, and she declined so to accept it, but took her dower in the real estate of the testator, the house and lot passed to the devisees under the residuary clause, and did not descend to the heirs of the testator. What was said in regard to a specific devise

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Opinion of the Court, per GROVER, J.

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of real estate, which from any cause did not take effect, was obiter. In *Van Kleeck v. The Dutch Church*, it was held that land devised to a corporation, which did not take effect, from want of capacity to take, did not pass under the residuary clause, but descended to the heirs. The decree in this case was affirmed upon appeal by the Court for the Correction of Errors. (20 Wend., 458.) The ground upon which the case was decided was that it appeared from the will, that the testator presumed that he had, by the will, disposed of the entire fee, leaving nothing remaining for further disposition, and therefore could not have intended to dispose of any interest in such land by the residuary clause. The opinions show that if the disposition made, had been upon a contingency that might have left an interest undisposed of, such contingent interest would have passed under the residuary clause. The case of *Greene v. Dennis* was analogous to *Van Kleeck v. The Dutch Church*, and was decided upon the same ground. These cases, if correctly decided, do not determine the present. Here there was a remainder in the lands given to John and Gideon, contingent upon the death of either, leaving no surviving descendants, and this remainder was not disposed of by the will unless under the residuary clause. The residuary clause gives all the real estate not otherwise disposed of, and thus brings this contingent remainder directly within the language of that clause. The presumption is, that the testator understood this, and intended what the language used by him plainly imports. This conclusion is fully sustained by authority. (*Bowers v. Smith*, 10 Paige, 193; *Redfield on Wills*, part 2d, 444; 1 *Jarmin on Wills* 590, 591; *Doe v. Weatherby*, 11 East, 322; *Wheeler v. Walroone*, Aleyn R., 285.)

The remaining question is, whether, by the will, the personal estate is discharged from the payment of the debts in favor of the legatees, unless the real estate charged with such payment shall prove insufficient for that purpose. By the will the testator gives his personal estate to legatees named therein, and charges the payment of his debts upon certain specified

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Statement of case.

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real estate, and, if that shall prove insufficient, charges his other real estate with such payment; thus manifesting his intention to make his real estate the primary fund for the payment, and to exonerate the personal estate in favor of the legatees thereof. The law will carry this intention into effect, as between the legatees of the personal and the devisees of the real estate. (Williams on Executors, 1542, and cases cited.)

The judgment appealed from must be affirmed.

All concurring,

Judgment affirmed.

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JOHN B. AYRES, respondent, v. THE WESTERN RAILROAD CORPORATION, appellant.

On an appeal to this court from a judgment, the order of the Supreme Court, sustaining a demurrer to one of the defendant's answers may be reviewed as an intermediate order involving the merits and necessarily affecting the judgment, although there has been a trial on the issue of fact raised by the other answers, and the judgment was entered upon the decision thereon.

An answer to the jurisdiction of the State court, setting up a removal of the cause to the United States Circuit Court, by filing the petition and bond with the clerk of the State court, according to the statute of the United States and the practice in such case made and provided, is sufficient in form and not demurrable, although omitting to allege that such filing was at the time of entering the defendant's appearance in the State Court.

The restriction of the eleventh section of the United States judiciary act (chapter 20, U. S. Laws of 1789), upon the jurisdiction of the United States Circuit Court as to suits to recover the contents of any promissory note or other chose in action in favor of an assignee, does not apply to suits removed thither from a State court under the twelfth section of the act. *Bushnell v. Kennedy* (9 Wallace, 387) followed.

(Argued March 30th and decided April 4th, 1871.)

APPEAL from a judgment of the General Term of the Supreme Court in the Third district, affirming a judgment

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for the plaintiff, rendered on the decision of a judge without a jury. This was an action to recover the value of certain cases of paper, shipped by the plaintiff's assignor on board the cars of the defendant, at Springfield, Mass., and consigned to several parties in the Western States, via The Western Transportation Company, and burned at the defendant's depot in East Albany, July 5th, 1861.

The cause of action (stated in the complaint to be for breach of a contract to carry safely and deliver to the consignees) was assigned to the plaintiff, a citizen of this State, and resident in the city of New York, where the venue was originally laid. Before answering, the defendant filed his petition and bond, and made his motion to remove the case to the United States Circuit Court, 2d circuit, southern district of New York. This was granted at the Special Term, and that order reversed and motion denied by the General Term of the Supreme Court in the First judicial district, on the ground, that defendant had obtained time to answer, and on the order served, his attorney had indorsed his name generally as attorney, and hence, had "entered his appearance" before filing his petition and bond for removal; also, on the ground that the Circuit Court was prohibited by the eleventh section of the U. S. judiciary act from assuming jurisdiction, the suit being by assignee to recover on the contract of the carrier. (*Ayres v. W. R. R. Corporation*, 48 Barb., 132.)

The defendant thereupon put in his answer. The first answer was to the merits. The second answer was as follows:

"And for a further and second answer to the said complaint, the defendant alleges that the said plaintiff is a citizen of the State of New York, and the said defendant is a citizen of the State of Massachusetts; that on the 5th day of July, 1866, a petition of the defendant, and bond with sufficient surety, for the removal of this action for trial into the Circuit Court of the United States, for the southern district of the State of New York, were filed with the clerk of the city and county of New York, according to the statute of the United States, and the practice in such case made and provided;

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that notice of the filing of such petition and bond, and that this court would thereafter be moved to grant the prayer of said petition for such removal, on the ground that the plaintiff was a citizen of this State, and the defendant a citizen of the State of Massachusetts, and that the matter in dispute exceeded the sum of \$500, was duly served upon the plaintiff's attorney; that the said motion was made at a Special Term of this court, and, on the 13th day of August, 1866, granted, and it was thereby ordered that the said security so offered by the defendant be accepted, and that this court proceed no further in this cause, and that the same be removed for trial into the Circuit Court of the United States, for the southern district of New York; that upon an appeal from said order to the General Term of this court, taken by the said plaintiff, the same was reversed, with costs, by the said General Term."

And the said defendant, in further answer to the said complaint, alleges that all the proceedings for the removal of said action into the Circuit Court of the United States, for the southern district of New York, were in conformity to and accordance with the statutes of the United States, and the practice in such case made and provided, and that all the provisions of said statutes and practice have been complied with by said defendant, and, as the defendant is informed and believes, this action has been removed for trial into the Circuit Court of the United States for the southern district of New York, where the same is now pending; and that by reason thereof, this court has lost jurisdiction over the same."

The venue was changed to Albany county on motion of the defendant.

The plaintiff demurred to the second answer, and the demurrer was sustained at Special Term, and, on appeal, at General Term in May, 1867. The cause was subsequently tried on the issues of fact raised by the other answers, and judgment ordered for the plaintiff, April, 1869. No evidence was introduced as to the second allegations of the answer, but they were made the basis of a motion for nonsuit.

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At the same time the plaintiff entered his judgment for \$2,387.39, upon the issues of fact, a judgment against the defendant upon the demurrer was filed with the roll, claimed by the plaintiff to have been filed by the defendant themselves, the General Term order as to which, in May, 1867, had given them leave to answer over. They then appealed to the General Term from both judgments, and the General Term affirmed "the judgment."

The defendant then appealed to this court.

*John H. Reynolds*, for the appellant, upon the points noticed in the opinion, cited 1 U. S. Stat. at Large, 79, § 12; Brightly's Dig., 128; Conkling Treatise, 3d ed., 123, 126, 173, 179, 475, 476. A corporation is a citizen within the meaning of this act. (*Stevens v. The Phoenix Ins. Co.*, 41 N. Y., 149; *The Louisville R. R. Co. v. Letson*, 2 How. U. S., 497, 554, 555, 558; *Rundell v. Del. and R. Canal Co.*, 4 How. U. S., 80; *Salmon Falls Manuf'g Co. v. Godard*, 14 How. U. S., 446; *Phil. R. R. Co. v. Derby*, 14 How. U. S., 468; *Marshall v. The B. and O. R. R. Co.*, 16 How. U. S., 314; *Charter Oak Ins. Co. v. Star Ins. Co.*, 6 Blatchf., 208; *Fisk v. Union Pacific R. R. Co.*, 6 Blatchf., 362; *Bushnell v. Kennedy*, 9 Wallace U. S., 387; 17 Amer. Law Reg., 229.) It is a public act, and need not be specially pleaded. (1 Chitty Pl. [Springfield ed. of 1840], 215; 1 T. R., 145; Stephen Plea., 352.) The action is not by an assignee within the 11th section of the judiciary act. (*Deshler v. Dodge*, 16 How. U. S., 622; *Clark v. City of Zanesville*, 4 Amer. Law Reg.; *Bushnell v. Kennedy*, 9 Wallace, 387.)

*Samuel Hand*, for the respondent, that the presumption was in favor of jurisdiction, and the second answer, to be sufficient, must set out facts clearly showing want of jurisdiction, and must allege that at the time of entering his appearance the defendant presented a petition, etc., cited Judiciary act, 12, § 1, U. S. S., 79; *Cooley v. Lawrence* (5 Duer, 610); *Peters' C. C. Rep.*, 44; 1 Paine's C. C. Rep., 410; *Ayers v. W. R. R.*

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*Corp.* (48 Barb., 132). That the 11th section of the judiciary act prevented removal, he cited *Campbell v. Perkins* (8 N. Y., 430); *Anderson v. Manufacturers' Bank* (14 Abb., 426); *Manhattan Co. v. Camden R. R. Co.* (52 Barb., 721); *Suydam v. Irving* (2 Blatch., 359).

FOLGER, J. On this appeal, this court may review the determination of the General Term upon the demurrer of the plaintiff to the second answer of the defendant. It was an intermediate order, involving the merits and necessarily affecting the judgment. (Code, § 11, 1.)

The second answer was good in form, its allegations were sufficient to permit proof of all the facts essential to make out the defence set up. It was good in substance also, and alleged a valid defence unless it was obnoxious to the limitation of the jurisdiction of the District and Circuit Courts of the United States, contained in the eleventh section of the judiciary act. (1 U. S. Stat. at Large, p. 78, § 11.)

Upon such a question, the authority of decisions in the Federal courts, is paramount. If it is there clearly and definitely held, that in a case where a defendant has taken the necessary steps in accordance with the statute to remove the cause to the United States Court, jurisdiction of the action cannot be retained in the State Court by virtue of the limitation above adverted to, the question is settled for us.

In *Bushnell v. Kennedy* (9 Wallace, 387); it is held, CHASE, Ch., J., delivering the opinion of the court, that any defendant being a citizen of another State than the plaintiff, is entitled, upon application at the proper time, to have his cause removed to a Circuit Court of the United States, and that the restriction of the eleventh section, not being found in the twelfth section, and the reason for it not existing, the defendant is not retarded by it, in the exercise of his right to change the jurisdiction of the action. In this opinion all the judges concurred. It is not necessary that we reiterate the reasons there given.



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It follows that the judgment of the court below be reversed.

PECKHAM, J., having been a member of court below did not sit. GROVER, J., did not vote. All the other judges concurring, judgment reversed without costs, the cause being removed to the Circuit Court before issue, and the court below having no jurisdiction.

NOTE.—The doctrine, that on an appeal from a judgment obtained upon the trial of issues of fact, the orders sustaining or overruling demurrers to the pleadings, are to be reviewed, stated in its broad extent does not seem entirely in harmony with the opinion of the court in *Depuy v. Strong* (87 N. Y., 372); where it was held, that upon appeal from a judgment in trespass upon a verdict on an issue of fact, where the defendant had interposed a demurrer to the complaint, which had been wrongfully overruled at Special and General Terms, this court could not correct that error.—REP.

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| 45  | 265 |
| 108 | 236 |
| 45  | 265 |
| 167 | 57  |

ABNER H. McCORMICK and JAMES B. DAWKINS, Respondents, v. JOHN B. SARSON, Appellant.

Upon a sale of goods, if the purchaser accept them after examination, or an opportunity for examination, he cannot afterward, in the absence of any fraud or warranty, upon being sued for the price, object that the property was not of the agreed quality. And this rule applies to a sale of all the goods of various grades at a particular place, quantity of each unas-  
certained, to be paid for at fixed rates for the various qualities.

Accordingly, where the defendant, having purchased all the lumber in the plaintiff's mills at an agreed price per 1,000 feet for the "prime," another price for the "merchantable," and another price for "refuse," and, the lumber having been delivered, after opportunity for examination, gave a receipt for so many thousand feet of prime lumber, so many thousand feet of merchantable and so many thousand feet of refuse.—*Held*, in an action for the price, evidence offered by the defendant to show that all the lumber for which the action was brought as "prime," and a large portion as "merchantable," was neither, but in fact "refuse," was properly excluded. (CHURCH, Ch. J., ALLEN and GROVER, JJ., *contra*.)

(Argued February 3d; decided April 4th, 1871.)

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APPEAL from the Superior Court of the city of New York, affirming a judgment for the plaintiff, at the trial term.

The action was to recover the purchase price of a quantity of lumber sold the defendant by the plaintiff. The sale was by written contract. By its terms the plaintiff sold the defendant all the sawed lumber then in a certain yard, at the rates stated in a schedule annexed to the contract, to wit: seventeen dollars a thousand for "prime," fifteen dollars a thousand for "merchantable" and eight dollars a thousand for "refuse." The amount in feet was to be ascertained by a competent measurer. Upon the trial, the plaintiff offered the following receipt, signed by the defendant's agent.

"Received, Cedar Keys, Florida, September 28, 1867, of McCormick & Dawkins, 53,732 feet prime lumber, 166,115 feet merchantable lumber, 58,562 feet refuse lumber, in accordance with an agreement entered into by McCormick & Dawkins at Cedar Keys, Florida, and John B. Sarson, of the city of New York, on the 17th day of June, 1867."

The answer of the defendant, beside a general denial, set up that the contract was made on Sunday, by means of deceit, fraud and false representation, and asked to have it set aside as void.

At the close of the plaintiffs' case, the defendant offered to show that all the lumber for which the action was brought as prime, and a large portion of the lumber for which the action was brought as merchantable, was not prime or merchantable as respectively claimed, but was only refuse and of a vastly inferior quality to "prime or merchantable." This was excluded, and the plaintiff had judgment for the agreed price.

*Moody B. Smith*, for the appellant.

*Livingston K. Miller*, for the respondent.

By the Court—PECKHAM, J. This was an action for the price of different kinds of lumber, alleged to have been sold

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and delivered. Denial by defendant. The contract proved required the delivery to the defendant of all the lumber in plaintiff's yard, consisting of three different qualities at different prices. The plaintiff had proved the delivery to, and *acceptance* by defendant's agent, of the lumber, as of the different qualities claimed, viz., so much prime, so much merchantable, and so much refuse. The defendant then offered to prove that "all the lumber for which the action was brought as prime and a large portion of that claimed as merchantable, was not prime or merchantable, but only refuse, and of a vastly inferior quality to prime or merchantable."

This was rejected by the court, and defendant excepted.

The precise ground of the decision does not appear. In the General Term, the court inferred that it was rejected upon the pleadings. That no notice had been given of any claimed defect in the lumber delivered and received as prime or merchantable.

If the plaintiff claimed there was any defect in the pleadings, he should have taken that objection at a time and place where they could have been amended. We ought not to listen to such an objection when first presented to a court of review; to do so might in many cases cause great injustice.

Was the evidence offered admissible on the merits? I think not. The evidence then before the court proved that the lumber had been *delivered* to and *accepted* by defendant's agent as of the qualities claimed. The contract had been executed. The receipt was evidence that the defendant had knowingly accepted this lumber and received it as of such a quality,

The testimony offered did not propose to contradict that. In fact, it was entirely in harmony with that evidence. It said virtually: I had an opportunity of examining this lumber; I did examine it, and accepted it as prime, but afterward I ascertained it was not prime; I changed my opinion and judgment; the fact was otherwise.

This will not do. If he accept it after examination or after an opportunity for examination, as fulfilling the contract, he

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is bound by such action. This rule is well settled. (*Reed v. Randall*, 29 N. Y., 358; *Gillespie v. Torrance*, 25 N. Y., 306; *Hargous v. Stone*, 1 Seld., 73; *Sprague v. Blake*, 20 Wend., 61; *Hart v. Wright*, 17 Wend., 267, 277; 1 Wend., 185; 20 J. R., 196.) This is the rule in the absence of any fraud or warranty. No fraud or warranty was claimed or offered to be proved in this case. None was pretended.

If the defendant could have had any relief, he should have given notice of the inferior qualities of the lumber as soon as discovered, and offered to return it unless plaintiff would consent that it should be regarded as refuse, and so applied upon the contract. (*Sprague v. Blake*, *supra*; *Reed v. Randall*, *supra*.) There is no evidence of any such notice or claim by the defendant.

Nor does it make any difference that the defendant was to take all the lumber of the plaintiff. The contract provided for the receipt of different qualities. When delivered and accepted as prime quality, that lumber was then upon the same basis in law as if the contract had provided only for the delivery of prime lumber. It was controlled by the same rules, and so of the other qualities. The judgment is affirmed.

FOLGER, RAPALLO and ANDREWS, JJ., concur.

CHURCH, Ch. J., ALLEN and GROVER, JJ., dissent.

Judgment affirmed.

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GREEN BENNETT and CHARLES M. BENNETT, Appellants, v.  
ELBERT W. COOK and others, Respondents.

The plaintiffs were first and second and the defendant third indorsers upon two drafts and a note of one N., who held a contract for the purchase of lands. N., being insolvent, transferred the contract to the defendant, absolutely in form, but in fact as security for the latter's liabilities on N.'s account, including the drafts and note. On the same day he made a general assignment to the plaintiffs, in trust for creditors, preferring the drafts and note. Shortly after this, the plaintiffs gave to the holder of the

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drafts and note, for the aggregate amount thereof, a note made by one of them, indorsed by the other as first indorser, and by the defendant as second indorser. The holder, a bank, thereupon gave up to them the drafts and note, with the bank mark of cancellation upon them. One of the plaintiffs, under the suggestion of the defendant, then brought action against the acceptor of the drafts, but failed from defect of parties. The new note was renewed, from time to time, and finally paid by the defendant. About the same time, the defendant paid up the amount due upon N.'s land contract, and took a deed of the premises. Immediately after paying the note, he brought suit against the plaintiffs to recover back the moneys so paid, and after litigation (in which the plaintiffs defended on the ground that the defendant had received N.'s contract and deed as security for the original drafts and note, and that the value of such security exceeded the amount paid by him, which defence was denied, in all particulars, by the defendant), recovered judgment against them for the whole amount, which judgment they paid. The plaintiffs then brought this action, asking either to be permitted to redeem the contract as assignees of N., or to be subrogated as sureties to the defendant's rights in the contract, to the extent of their payments.—*Held*, this action having been commenced more than ten years after the assignment, and after the giving of the new note by the plaintiffs, with defendant as indorser, but within ten years after the payment by the plaintiffs of the defendant's judgment against them, that the right to redeem was barred, but the right to subrogation not having accrued until the payment of the judgment, was not barred by the statute of limitations.—*Held*, further, that the defendant's judgment was no bar to this action to enforce such right of subrogation.

(Argued February 15th; decided April 4th, 1871.)

APPEAL from the judgment of the General Term of the Supreme Court, in the sixth judicial district, reversing that part of the judgment of the referee appealed from by the defendants, and affirming that part appealed from by the plaintiffs.

The action was originally commenced in the name of *Green Bennett v. Charles Cook*. During its trial Charles M. Bennett was added as co-plaintiff, and Charles Cook having died, the present defendants, who are both his heirs and administrators, were substituted as defendants.

The action was brought in a double aspect, either to be permitted, as assignee of one Nash, to redeem from the defendants the premises described in the complaint, or to be sub-

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rogated to Cook's interest in the premises to the extent of their claim or lien thereon, for moneys paid by them as sureties of Alvah Nash.

The facts sufficiently appear in the referee's findings, which are as follows :

1. That on the 10th day of August, 1845, Samuel Watkins agreed to sell one Alvah Nash, 100 acres of land for the consideration price of \$1,500, the land being situate in the town of Dix, in the then county of Chemung, now Schuylers.

That to carry such agreement into effect, a written contract of such sale and purchase was executed by Watkins and Nash, dated on the day and year aforesaid, which contract is referred to in the complaint.

2. That in drawing this contract the south line thereof was not made parallel to the north line, as agreed between Watkins and Nash, but made to run in such a direction as to include a much larger quantity of land than Watkins had agreed to sell or Nash to purchase.

That Nash knew at the time of the execution of the contract, that he was getting described in the contract this excess of quantity, and had the contract prepared with reference thereto.

That Watkins, at the time of the execution of the contract by him, had no knowledge that the contract was different from the agreement, and executed the same, in the supposition and belief that the description of the land in the contract, corresponded with the agreement made.

3. That when Watkins discovered the error in the contract, viz. : That the south line was not parallel to the north line, and by reason thereof, a larger quantity of land was included, he refused to perform the same, as to the land lying south of such parallel line, or to execute a deed thereof, but was willing to execute a deed for 100 acres, under and in pursuance of the agreement and at the contract price.

4. That at the time of the execution of the contract, Nash paid Dr. Watkins, to apply thereon, the sum of \$200, which sum is all that Nash ever paid to apply on the purchase price.

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5. That on and prior to the 4th day of December, 1848, Charles Cook was liable as indorser and guarantor upon notes made by Nash, as follows :

|   |                  |
|---|------------------|
| One note to Martin Hammond, dated May 1, 1848, and due May 1, 1849..... | \$1,600 00       |
| One note held by Chemung Canal Bank.....                                | 900 00           |
| One note held by Cook .....   | 197 00           |
| Accounts of Cook against Nash of some amount, probably .....            | 300 00 or 400 00 |

Cook was also third indorser upon a note held by the Chemung Canal Bank of \$600; two drafts of \$2,000 each drawn by Alvah Nash upon D. N. Bedient, which drafts were accepted by said Bedient and indorsed by the plaintiffs in this case, as first and second indorsers, and by Charles Cook as third indorser, and said \$600 note was in like manner indorsed, and said drafts were held by the Chemung Canal Bank.

These drafts and notes were not paid at maturity, and the indorsers were duly charged as such.

6. That at that time Nash had other paper or notes in said bank, as follows, viz.:

|                       |            |
|-----------------------|------------|
| One note for.....     | \$1,800 00 |
| One for.....          | 1,000 00   |
| And one note for..... | 500 00     |

These notes were indorsed by the plaintiffs and not by Cook.

That the amount of these notes at said time, together with the two drafts and the \$600 note, was \$7,900.

7. That on the 4th day of December aforesaid, the said Nash found himself insolvent and unable to pay all of his debts in full, and to secure the said Cook, on account of his said liabilities (as well as his liability as indorser of the two drafts and the \$600 note), he executed and delivered to Cook an assignment of the aforesaid contract, absolute in form, but the same was intended, and was in fact, a security.

8. That on the same day the said Nash executed and delivered to the plaintiffs a general assignment of all his pro-

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perty and effects, in trust, for the benefit of his creditors, preferring the aforesaid \$7,900; that the plaintiffs accepted the trust under said assignment, entered upon the discharge thereof; that plaintiffs have never been discharged from the trust.

9. That in the month of December, 1848, and shortly after the assignment by Nash, the plaintiffs gave their own note to the Chemung Canal Bank, for the said two drafts of \$2,000 each, and the \$600 note, less \$200, which had been paid, which drafts and notes had then matured; that the said note, as given by the plaintiffs, was \$4,400, the plaintiff, Green Bennett, being the maker, Charles M. Bennett, co-plaintiff, first indorser, and Charles Cook second indorser.

That at the time of giving said note, said drafts and notes were canceled by the bank, by their mark of cancellation, and delivered up by the bank to the plaintiff, Green Bennett, who from that time to the day of the trial of this cause, has held and had said drafts and note.

That said \$4,400 note was renewed from time to time, until the month of November, 1849, same maker and indorsers, at which time Cook was obliged to and did pay said note to the bank.

10. That in 1849, the said Green Bennett made an assignment of his property to said Charles M. Bennett and W. H. Gibbs, in trust, for the benefit of his creditors.

That in the year 1854, said Green Bennett's debts were all paid, the purpose of the trust fulfilled, and his assignees ceased to act under the assignment, but have been formally discharged, and Green Bennett resumed and has ever since exercised exclusive control of all his property.

11. That on the — day of November, 1849, the said Samuel Watkins and Charles Cooke made and entered into an agreement by which the said Watkins conveyed to Cook 283 acres of land, for the consideration, as expressed in said deed, of \$5,000.

The said Watkins refused to recognize or perform said contract, as drawn, as to excess of land therein described, [but



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was willing to and did recognize the validity thereof to the extent of 100 acres of land, and that it was a part of the arrangement between Watkins and Cook, that Watkins should and did convey by said deed, 100 acres of land under and by virtue of said Watkins contract.

And that in pursuance thereof, the said Cook, for said 100 acres, did pay said Watkins the balance unpaid upon said contract, that is to say, the sum of \$1,300, with interest thereon, from the 10th day of August, 1845, to the date of said deed.]

And that the excess of land embraced in the description in said contract, and an additional 100 acres were included in said deed, and conveyed to said Cook, under an arrangement then made, separate and distinct from the Nash contract, and for a consideration then agreed upon and paid by the said Cook.

That from the date of said deed to the time of this trial, the said Cooke has been in possession of all the premises in said deed described, claiming to be the absolute owner thereof, and the heirs and successors of said Cook are in possession thereof.

12. That after the payment of the said \$4,400 by the said Cook on the Chemung Canal Bank, and in the month of December, 1849, the said Cook brought an action in the Supreme Court of this State, against the plaintiffs herein, to recover the sum so as aforesaid paid by him.

That the said Green Bennett and Charles M. Bennett appeared in said action, and put in an answer, alleging :

That Cook received the assignment of said contract as collateral security for his contingent liability as indorser upon the said two drafts and note of \$600, for which the note paid by him was given.

That he had taken a deed and possession of the land embraced in said contract, and that the value thereof exceeded the amount paid and claimed by Cook in said action.

That said Cook, by his reply to said answer, denied that he had received an assignment of said contract, or held the same as security for any liability contracted by him as

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indorser of said drafts and note, or of the note thus paid by him to the bank.

That said action was litigated until February, 1854, when judgment was entered in Chemung county clerk's office for \$6,332 damages, interest and costs, in favor of Charles Cook against Green Bennett and Charles M. Bennett.

13. That on the said 21st day of February, 1854, the said judgment was paid to Cook as follows, which is to be deemed a payment by Green Bennett for the purpose of this action:

|   |            |
|---|------------|
| Peter Tracy's check for .....             | \$4,164 00 |
| Charles and John Bennett's check for..... | 1,291 09   |
| Cash .....                                | 283 00     |
| Cook's receipt for.....                   | 374 80     |
| And in Green Bennett's check.....         | 80 40      |

That said sum was borrowed by Green Bennett's sons of Tracy, they to repay the same.

That the assignees of Green Bennett sold said sons a farm held by them as such assignees of Green Bennett, and the consideration of such sale was the raising by those sons of the money to pay the said Cook judgment.

That the sum of \$500 was paid by the plaintiff, Charles M. Bennett, from his individual funds on some of the debts referred to, which Nash owed, but on which of them does not appear.

14. That after the payment of said judgment, as aforesaid, and in 1854, the said Green Bennett commenced an action in the Supreme Court, upon said \$2,000 drafts, against the said Legrand N. Bedient, as the acceptor thereof, and was nonsuited in said action upon the trial thereof.

That the said plaintiffs never canceled said drafts nor authorized them to be canceled, and in the action commenced therein against said Bedient it was not adjudged by the court that the same could not be maintained by reason of the alleged cancellation of said drafts, but the same was dismissed for want of the proper parties.

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15. That the said plaintiffs, nor either of them, have ever, before the commencement of this action, demanded of the said Cook the right of substitution or subrogation, or asserted to him any right or claim other than the right of redemption as the assignees of Alvah Nash.

As conclusions of law, from the foregoing facts, the referee held and decided:

1. That the deed herein mentioned, from Samuel Watkins to Charles Cook, to the extent of 100 acres herein conveyed, viz., the north 100 acres, was a mortgage or security, held by Cook as an indemnity for his individual liability for Nash, and his individual indebtedness against Nash.

And also, as an indemnity for his liability as an indorser upon the two \$2,000 drafts drawn upon and accepted by Bedit, and the \$600 note held by the Chemung Canal Bank.

2. That the plaintiffs, by the general assignment by Nash to them, as his assignees, had the right to redeem said 100 acres of land, by the payment of the amount for which Cook had the contract as a security, together with the amount which Cook paid Watkins as the unpaid purchase-money, but said right of redemption is now barred by the statute of limitations.

3. That by reason of payments made by the plaintiffs individually upon the debts of Nash, upon which the plaintiffs and Charles Cook were liable, and the payment of which was covered by the assignment of the Watkins contract to said Cook, among which was the judgment of said Cook against the plaintiffs above referred to, the plaintiffs have an equitable lien to the extent of the said payments by them respectively made, and unless the same shall be paid to them by the said Charles Cook, with interest, they have the right to be subrogated to all the rights of said Cook, in and to said premises, included in the said parallel lines, containing 100 acres, but such right of the plaintiff is subject to that of the defendants, to be first paid the amount remaining unpaid, of the claims and demands, to secure the payment whereof the said Charles Cook received the assignment of the said contract,

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Statement of case.

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whether by indorsement by him, or for indebtedness to him by said Nash.

4. That the right of subrogation is not barred by the statute of limitations.

5. That the defendants have the right to pay to the plaintiffs the amount so by them respectively paid, of such debts and liabilities, and relieve said premises of the lien thereof, if defendants so elect, and in that case the amount so paid by the plaintiffs respectively be ascertained by the further hearing of this action; but, in case the said defendants do not so elect, then the said 100 acres be sold under the direction of the court, and out of the proceeds of such sale the defendants be first paid the amount to which they are entitled on account of the liabilities of said Charles Cook, for Nash, and the indebtedness of the latter to him, on account of which the assignment of said contract was made to secure the amount paid by said Charles Cook, of the purchase-money, together with defendant's costs and referee's fees in this action, and that there be paid to the plaintiffs the amount by them respectively paid, of such debts and liabilities, with interest, and surplus, if any, be paid to the defendants.

6. That the record of the said judgment in favor of the said Charles Cook against the plaintiffs, is no bar or defence to the claim of plaintiffs in this action.

7. That the cancellation of said two \$2,000 drafts, and the discharge of the acceptor thereon, constitutes no defence, either in whole or in part, to the right of subrogation, or substitution of the plaintiffs, and to have the same paid out of said 100 acres of land.

The defendants excepted to the rulings of the referee except as to statute of limitations on the right to redeem. The plaintiffs excepted to the finding of the referee that the statute of limitations had run on their right to redeem.

Both parties appealed to the General Term, which held the statute of limitations had run both upon the right to redeem as assignees of Nash, and the right to subrogation as sureties.

## Statement of case.

*N. A. Halbert* and *T. W. Dwight*, for appellants, that a renewed note attaches to it the incidental security which the original had. (*Cleveland v. Martin*, 2 Head., 128; *Rogers v. Traders' Ins. Co.*, 6 Paige, 383; *Boswell v. Goodwin*, 31 Conn., 74, 83.) No length of time of holding possession by a mortgagee will bar the right of redemption if the mortgage is treated during that time as a subsisting security for the debt. (*Dexter v. Arnold*, 1 Sumner, 109; *Ayres v. Waite*, 10 Cush., 72; *Click v. Rollins*, 44 Maine, 116; Story on Equity, § 1028; *Calkins v. Isbell*, 20 N. Y., 147.) The relation of surety and principal carries with it the right of subrogation as to all securities placed in the possession of the creditor as surety or co-surety. (*Matthews v. Aiken*, 1 Comst., 595; *Elwood v. Diefendorf*, 5 Barb., 399, 413; *Lewis v. Palmer*, 28 N. Y., 271; *Craythorne v. Swinburne*, 14 Vesey, 159; White and Tudor's Leading Cases, and cases cited, vol. 1, 144-163; *Hayes v. Ward*, 4 John. Ch., 123.) Securities are a trust fund for the payment of the debt. (*Butler v. Birkey*, 13 Ohio U. S., 574; 8 Ala., 866; 3 Grattan, 358; *Agnew v. Bell*, 4 Watts, 31, 33; *Carpenter v. Kelly*, 9 Ohio, 106; *Pool v. Williams*, 8 Iredell, 286; *Hayes v. Ward*, 4 John. Ch., 123.) The same rule applies to co-sureties. (*West v. Belcher*, 5 Munford, 187; *McMahon v. Fawcett*, 2 Randolph, 514; *Rice v. Morton*, 19 Missouri, 261; *Elwood v. Diefendorf*, 5 Barb., 399; *Agnew v. Bell*, 4 Watts, 31, 33; 1 White and Tudor's Leading Cases, 162; *Butler v. Birkey*, 13 Ohio U. S., 514; 1 Story on Equity Jur., § 499, and cases cited; *Ramsey v. Lewis*, 30 Barb., 403.) It is well settled that there can be no subrogation as long as the principal debt or any part of it remains unpaid. (*Kyner v. Kyner*, 6 Watts, 221; *Bank of Penn. v. Potius*, 10 Watts, 148; *Cottrell's Appeal*, 23 Penn. [11 Harris], 295; *Stamford Bank v. Benedict*, 15 Conn., 437.) The principle is well settled that any relief can be granted consistent with the facts stated or proved, and when the facts are elicited, the pleadings, if necessary, will be amended as to parties or otherwise, or regarded as amended. (48 Barb., 96; 30 N. Y., 391; Code, §§ 173, 275.)

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Opinion of the Court, per PECKHAM, J.

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*Francis Kernan*, for the respondent. The referee and court below were right in holding that this claim was barred by the statute. (2 R. S., 301 [1 ed.], § 52; Code, § 97; *Roberts v. Sykes*, 30 Barb., 173; *Bruce v. Tilson*, 25 N. Y., 194; *Huntington v. Mather*, 2 Barb., 538.) The question whether the land contract was transferred to Cook as collateral security against his indorsement of this note and the two drafts was conclusively settled between these parties by an action, which resulted in Cook's favor. The Bennetts are estopped by that record from questioning this fact in the present suit. (*Gates v. Preston*, 41 N. Y., 113; *Davis v. Talcott*, 12 N. Y., 184, 188; *Bellinger v. Craigie*, 31 Barb., 534; *Foster v. Milliner*, 50 Barb., 385; *Harris v. Harris*, 36 Barb., 88; *Hayes v. Reese*, 34 Barb., 151, 156; *Demarest v. Day*, 32 N. Y., 281.)

PECKHAM, J. In my opinion the report of the referee was substantially right. The question is, was the note for \$4,400 given to and received by the bank in payment of the two drafts, etc., so as to enable the plaintiffs to call upon the defendant for the security he held against his liability on that claim? In the first place no payment is found by the referee and every presumption is in favor of the report for affirmance, not for reversal. In the next place the defendant after this alleged payment and extinction of these drafts by this indorsed note, advised and urged their prosecution against the acceptor. He knew all the facts in regard to the alleged payment, and certainly he would never have advised the prosecution of extinguished securities. They were prosecuted accordingly, but the suit failed because brought in the wrong name. The only evidence on the subject of payment, is that the bank received this indorsed note for these drafts and a note, and sent them to the plaintiffs with the bank mark of cancellation thereon, without any other evidence of agreement or authority to cancel them than is implied in the receipt of said indorsed note, and that evidence the referee did not seem to hold sufficient to satisfy him that it was received in

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Opinion of the Court, per PECKHAM, J.

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payment. The case of *House v. Buf. N. Y. and E. R. R.* (37 N. Y., 297) is an authority that where the note of a surety is received by the creditor in payment, the surety may sue his principal for indemnity as for money paid. That case does not aid the defence. The true question is, was this note a payment as between the plaintiffs and Cook the defendant? If it were, then of course they had a cause of action against the defendant at that time, and as more than ten years have elapsed prior to the commencement of this suit, all claim for subrogation must be barred. But it must be a payment as between these parties. The plaintiffs, to enable them to call upon the defendant to turn out to them the securities he holds for his own indemnity against these debts, must show that they have paid them and discharged the defendant from liability. Have they done so? If this could be called a payment they might as well have demanded the security from Cook before as after these drafts were taken up, as Cook's position is in no degree improved. He was liable on the drafts after the plaintiffs; such is his position on the note. He is even worse off. If the drafts were thus paid and extinguished, he thereby loses all claim upon the acceptor of the drafts. Thus he not only is discharged from no liability, but he loses some security, and the plaintiffs might demand that he surrender up the rest. It is quite clear that this transaction did not cancel those drafts as against the acceptor, though it might as against the bank. It was plainly contrary to the interest and intention of the parties to the \$4,400 note. It seems to me equally clear that the relations of the securities as to each other remained unchanged. The defendant was not discharged from liability as security for that draft. He might be, and in fact was, called upon to pay the new note. Authorities are cited, if authority be needed for such a proposition, that before a surety can demand subrogation, the party who holds the securities must be discharged from all liability for the debt on account of which he holds them. (*Kyner v. Kyner*, 6 Watts, 221; *Bank of Penn. v. Potius*, 10 id., 148; *Cotrell's Appeal*, 25 Penn. (11 Harris), 294;

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*Stamford Bank v. Benedict*, 15 Conn., 437, and many others.) If the plaintiffs could demand this security from the defendant before they had paid the new note, then the defendant would be left as surety thereon; as surety for the plaintiffs without any security whatever. There is no equity in that. In fact, it is not denied by the defendant that the debt should be paid before any claim could be made for subrogation. But it is insisted that the defendant became indorser upon this new note without any reference to his liability upon the demands for which they were given, a mere accommodation indorser thereon for the plaintiffs without any security. There is no such proof, and the presumption is the other way, under all the facts of this case. The right to demand this security from the defendant, then, or in other words, the cause of action, arose only when this \$4,400 note was paid. That was paid by satisfying the judgment recovered thereon in 1854, and hence this action is barred by no statute. The judgment upon this \$4,400 note was no bar to this action. If the defendant had then received the money upon the securities he held for this demand, it would have been different; as the case stood, it was no bar. At most, the court might have ordered that the defendants then, upon payment of the judgment, might be subrogated in the place of Cook, as to his securities for that demand. The Supreme Court, I think, was right as to the claim of the plaintiffs as assignees, that it was barred by the statute. That provision applies, or there is no statute bar. (Code, § 97.)

The judgment of the General Term of the Supreme Court is reversed, and judgment absolute is given for the plaintiffs, according to the report of the referee, with costs.

All concur except ALLEN and ANDREWS, JJ., who, not having heard the argument, did not vote.

Judgment absolute for the plaintiffs.



## Statement of case.

CHARLES C. WAYLAND and JAMES K. AYMER, respondents, v.  
DAVID J. TYSEN, appellant.

The court has no power to strike out as sham an answer consisting of a general denial of the material allegations of the complaint.

(Argued March 28; decided April 4, 1871.)

APPEAL from an order of the General Term of the Supreme Court in the second judicial district, affirming an order of the Special Term, striking out an answer as sham, and ordering judgment for the plaintiff.

The answer was as follows:

## SUPREME COURT.

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| CHARLES C. WAYLAND AND JAMES<br>K. AYMAR,<br>against<br>DAVID J. TYSEN. | } | <i>Answer of the Defendant<br/>to the complaint of the<br/>Plaintiffs in this case.</i> |
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The defendant, David J. Tysen, denies each and every allegation in the complaint of the above plaintiffs in this cause contained.

BRADLEY & NELSON,  
*Def'ts Att'ys,*  
173 Broadway, New York.

STATE OF NEW YORK, }  
*City and County of New York,* } ss:

David J. Tysen, being duly sworn, doth depose and say that he is the defendant in the above entitled cause, that he has read the foregoing answer, and that the same is true of his own knowledge, except as to the matters stated on information and belief, and as to those matters he believes it to be true.

DAVID J. TYSEN.

Sworn this 11th day of June, {  
1870, before me, }

CHARLES NETTLETON,  
*Notary Public, for N. Y. county.*

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Opinion of the Court, per GROVER, J.

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The motion to strike out this answer as sham was based upon the affidavits of the plaintiffs and others strongly tending to show its falsity.

*Alvin C. Bradley*, for the appellant.

*J. C. G. Smidt*, for the respondent.

GROVER, J. The order is appealable to this court, and must be reviewed in the same manner as it was required to be by the General Term, upon the appeal taken to that court by the defendant. (Code, § 11, subd. 4.) The entire answer of the defendant was struck out. It was a general denial of the complaint. It was verified by the defendant before service in the manner required by the Code when the complaint is verified. The motion to strike it out was made upon affidavits tending to show its falsity, and the court arriving at this conclusion, made the order striking it out as sham. The Code (§ 152) provides that sham and irrelevant answers and defences may be stricken out on motion, and upon such terms as the court may in their discretion impose. This answer is the equivalent of and substitute for the general issue under the common law system of pleading. It gives to the defendant the same right to require the plaintiff to establish by proof all the material facts necessary to show his right to a recovery as was given by that plea. Under the common law system the general issue could not be struck out as sham, although shown by affidavits to be false. (*Broome Co. Bank v. Lewis*, 18 Wend., 565.) This was not upon the ground that a false plea was not sham. That was always so regarded, but upon the ground that a party making a demand against another through legal proceedings was required to show his right by common law evidence, and that *ex parte* affidavits were not such evidence. The court, under that system, exercised the power of striking out pleas setting up affirmative defences as sham when shown by affidavits to be false, but not where the party verified such plea

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Opinion of the Court, per GROVER, J.

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by affidavit. (*Stewart v. Hotchkiss*, 2 Cow., 634.) It has been claimed, and the claim somewhat sanctioned by the Supreme Court, that these rules have been changed by section 152 of the Code. That by this all distinctions in striking out answers between such as merely deny the allegations of the complaint either generally or specifically, and those setting up affirmative defences, have been abolished. This question must be regarded as original in this court, notwithstanding the claim that this construction was adopted in *The People v. McComber* (18 N. Y., 315). A close examination of this case shows that this point was not involved. It is true that an opinion sustaining the construction contended for was given by STRONG, J., but the case shows that Judges DENIO and HARRIS dissented from this opinion, although concurring in the affirmance of the judgment upon the ground that the point was not involved. This case cannot, therefore, be regarded as an authority for the construction insisted upon. The section in question simply confers power upon the court to strike out sham and irrelevant answers and defences. This power the court, as we have seen, possessed and exercised under the pre-existing laws. For reasons deemed satisfactory it was not extended to the general issue. When this was interposed as a defence the party had a right to a trial by jury. This right is secured to him by section 2, article 1 of the Constitution. This right could not be taken away by simply changing the name from that of general issue to that of general denial. We have seen that the latter is the substitute for and the equivalent of the former, so far as to require proof by the plaintiff of all the material facts showing his right of recovery. This is an argument tending to show that the Legislature, in the passage of the section in question, only intended to sanction the existing practice, and not to confer any new power upon the court. Under the construction claimed, there is nothing to prevent the trial of this or any other issue upon affidavits. The moving party has only to satisfy the court by a preponderance of evidence of this character of the falsity of the plea, and it

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Opinion of the Court, per GROVER, J.

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may be struck out, although specifically verified by the party interposing it, notwithstanding such party may insist upon his right to a trial, when he can have the privilege of cross-examining the affidavits, and having their credibility passed upon by a jury. I think that by the true construction of the section, the power of the court to strike out pleadings was not extended beyond what it was under the pre-existing law. That we have seen extended only to such affirmative defences as were not verified by the oath of the defendant or other equivalent evidence. It may be said that a motion to strike out a pleading is not the trial of an issue joined thereby. This is literally true, but in substance the difference is scarcely perceptible. It calls for a determination whether the pleading be true or false; and if found false and struck out, the defendant is as effectually deprived of any benefit therefrom, as if found false upon a verdict, although he can derive no benefit from a failure to find it false, for the plaintiff will still be entitled to a trial of the issue. It will thus be seen that all the plaintiff hazards by the motion is the costs, while the defendant is precluded by an adverse result. It may be said that the power claimed will only be exercised in clear cases, where it is manifest that the desire of the defendant is only for delay, and that he is practising a fraud for this purpose by putting a falsehood upon the record. Concede the construction of the section claimed by the respondent, as we must to sustain the order, and its exercise cannot be confined to this class of cases. The judgment of the court must be exercised upon the affidavits, and if satisfied of the falsity of the pleading, although sustained by opposing affidavits, it becomes a duty so to decide by granting the motion. It is in the power of the plaintiff, in every case, as was done in this, to preclude the defendant from interposing either a general denial or a denial of specific facts by verifying his complaint. Thus he can prevent such answer, unless from the affidavit of the defendant it shall appear that it was interposed in good faith. The Code, it is true, allows the defendant to deny any knowledge or information sufficient to form a belief, and thus

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Statement of case.

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put the fact in issue. If he verifies this, what right has the plaintiff to strike out his answer by producing affidavits showing the truth of such facts of which the defendant was ignorant at the time of putting in his answer. Such affidavits fail entirely to show that the answer was put in in bad faith or that it was false; and yet this is the very class of cases where the court will be most frequently called upon to strike out the answer. If the defendant commits perjury in verifying the answer, as he must have done in this case, if he knew the allegations of the complaint were true, he ought to be prosecuted therefor. If plaintiffs, who complain of injury from delay by the fraudulent interposition of false answers, would perform the duty incumbent upon every good citizen, to prosecute those known to be guilty of perjury, they would effectually stop such an abuse. I am satisfied that the intention of the Legislature in enacting the section of the Code under consideration, was not to confer any new power upon the court, but to give legislative sanction to that exercised under the existing law. The order appealed from must be reversed, and an order entered denying the motion; but as the practice under which it was made had the sanction of some reported cases in the Supreme Court, it should be without costs to either party.

All the judges concurring, order reversed.

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LUDWIG C. MEYER and another, Respondents, v. LUTHER C. CLARK and others, Appellants.

An error in the charge of the court to a jury is not cured by a retraction of the charge, upon exception being taken to it, where such retraction is accompanied by the remark of the judge "that he had no doubt of the propriety of it" (the original charge).

Where a witness for the plaintiff was, at the time of the transaction in litigation, in the employment of the plaintiff, and about whose acts in such employment the controversy arose, — *Held* error to instruct the jury that, upon the question of his credibility, the jury might take into considera-

## Statement of case.

tion his continued employment by the plaintiff after the transaction, and that the retraction by the judge of this instruction (when excepted to), with the remark that he had no doubt of its propriety, did not cure the error,

The plaintiff having contracted to deliver to the defendant \$25,000 in gold, at a certain rate, a dispute arose between the parties as to whether he had fulfilled the agreement, or had fallen short \$5,000. *Held*, that the receiving back by the plaintiff of \$20,000, which the defendant claimed, was all that had been delivered, and the re-delivery of this, together with \$5,000 more, by the plaintiff, and receiving payment therefor, under the protest on his part that he had already delivered the whole \$25,000, and that he delivered the additional \$5,000 as an independent transaction, and not under the contract, was no estoppel to his action to recover the price of the controverted \$5,000 claimed by him to have been included in the first delivery.

(Argued March 24; decided April 4, 1871.)

**APPEAL** from the judgment of the General Term of the New York Common Pleas affirming a judgment for the plaintiffs upon a verdict at the trial term — BRADY, J., presiding.

The action was to recover for \$5,000 in gold, at the rate of 212 per cent, claimed to have been delivered by the plaintiffs, through their clerk, Corneilson, to the defendants, on the 26th of September, 1864. It appeared that the plaintiffs had contracted to deliver the defendants, on that day, \$25,000 in gold, at 212½. The plaintiffs gave evidence tending to show that they sent their clerks, Corneilson and Kirholtz, with five bags, containing \$5,000 of gold each, to the defendants' banking-house; that it was placed on the defendants' gold desk, and Kirholtz left while the defendants' clerk was in the act of taking the bags one by one from Corneilson at this desk. While so doing, one of the bags disappeared. The defendants' evidence tended to show that but four bags were delivered to the defendants by Corneilson. The defendants returned the four bags to the plaintiffs' clerk, on his refusing to leave them without payment for the whole \$25,000. The plaintiffs re-delivered the four bags and, on the defendants notifying them to perform by delivery of \$5,000 more, sent another bag of \$5,000, under protest that they had already delivered \$25,000, and without prejudice to their rights. The

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Opinion of the Court, per PECKHAM, J.

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plaintiffs have received payment for \$25,000 in gold, and they now sue to recover for the alleged \$5,000 delivered on the first day. The other facts are sufficiently stated in the opinion of the court.

*John E. Burrill*, for the appellants, upon the effect of the retraction of the judge's charge, mentioned in the opinion, cited *Penfield v. Carpenter* (13 Johns., 350); *Irvine v. Cook* (15 id., 239); *Haswell v. Bussing* (10 id., 128); *Erben v. Lorillard* (19 N. Y., 299).

*T. C. T. Buckley*, for the respondent.

By the Court—PECKHAM, J. The doctrine of voluntary payments, so urgently pressed at the argument, has no application to this case. The contract was to deliver \$25,000 in gold at 212½ per cent, payable on delivery. The plaintiffs claimed to have delivered it as agreed, five bags of \$5,000 each. The defendants insisted that only four bags, or \$20,000, had been delivered, and paid for but four bags. Three days afterward the defendants delivered the other \$5,000. The plaintiffs say, in substance: "We insist we have already delivered you \$25,000, as agreed; and protesting we are not bound to do this, yet we will deliver you \$5,000 more at 212½, and we will take our remedy for the \$5,000 delivered and not paid for."

Thus, then, the last bag was delivered and the last bag was paid for. The defendants paid for that specific bag and the plaintiffs received pay for that specific bag. This is conceded. Then that last bag is not in controversy here.

The action is for the bag of \$5,000 gold claimed by plaintiffs to have been delivered to defendants on the 26th of September, when they say they delivered five bags and the defendants say they delivered but four, and when confessedly defendants paid for but four.

Now what possible defence to the claim for payment for the fifth bag of gold which the jury find was delivered on the 26th

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Opinion of the Court, per PECKHAM, J.

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and not paid for, is it to say that three days thereafter the plaintiffs delivered another bag of gold to defendants and received their pay for it?

This last bag did not pay for the other. That is not pretended. Nor did it estop the plaintiff from claiming pay for the other. That is not pretended.

Clearly the bag claimed to have been delivered and not paid for, was not a case of voluntary delivery nor a gift. This cannot be disputed. If the last bag was voluntarily delivered, it is of no consequence, because, 1st. It was paid for; and, 2d. It is not sued for.

When the last bag was delivered gold was doubtless higher than 212½ or the defendants would not have pressed for its delivery. But it was demanded at that, delivered and paid for at that. If it had been worth 250 the plaintiffs could not recover the difference, because as to that difference the principle of voluntary payment would apply. This is the extent of its application to these transactions.

Some other questions were argued not deemed important to consider, as a new trial must be had for an error in the charge of the judge, and on another trial they may assume a different aspect. The point already discussed is necessarily in the case.

The court charged the jury that they might take into consideration as bearing upon the credibility of Corneilson the fact of his continued employment by the plaintiffs after the transaction. Exception by defendant's counsel.

The judge then charged that inasmuch as the counsel had excepted to the charge upon this point, he would retract it, though "he had no doubt" about its propriety.

The fact that the plaintiffs had continued the witness in their employment after the dispute had arisen as to this gold delivery was not a fact which the jury could consider in deciding upon his credibility.

The plaintiffs had no personal knowledge of the transaction, even if that could be thrown in to sustain the witness or strengthen his character. Their belief in his truth was of not



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Statement of case.

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the slightest moment to the jury. Besides, a party may quite as well retain in his employ one about to be a witness for him in an important controversy for other reasons than entire faith in his truth. The charge was well calculated to mislead. Nor was the error cured by the qualified retraction. A party is entitled to a distinct charge without qualification or condition, if entitled at all. A court has no right to break the force of a charge by saying that, true he will charge so, but still he does not believe it to be law. The jury in such case may well act upon what the judge tells them he believes to be the law. They may well say, the judge told us he believed that to be the law; that he had no doubt of it; of course he knows what the law is. Why, then, should we not act upon the law as it is?

This is wrong and wholly mischievous in its tendency. Here was a close question of fact before the jury. In its consideration, it was important that the jury should not be misled as to the faith to be given to either side. For this error in the charge the judgment is reversed and a new trial granted, costs to abide the event.

All concurring in the result, judgment reversed.

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DOUGLAS CHESEBROUGH, Appellant, v. THOMAS H. TOMPKINS, impleaded, etc., Respondent.

In an action against the maker of a note, where the holder claimed title under an indorsement of the payee's name, made by one claiming to be his agent for that purpose, the plaintiff was nonsuited, on the ground of failure to show title in the plaintiff. It appearing upon the trial that the only authority of such agent was in writing not produced, and a motion having been made by the defendant on that ground to strike out his oral testimony of authority, — *Held*, in this court, that the nonsuit was right, and the case not stating what disposition was made of the motion to strike out, it would be presumed, in support of the nonsuit, that it was granted, leaving no evidence whatever of the plaintiff's ownership of the note.

(Argued March 23; decided April 4, 1871.)

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Opinion of the Court, per RAPALLO, J.

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APPEAL from the late General Term of the Supreme Court in the Fourth judicial district, which affirmed a nonsuit of the plaintiff at circuit.

The action was upon a promissory note, of which the following is a copy: "\$200. Saratoga Sp'gs, Sept. 22d, 1866. One year after date I promise to pay George W. Palmer or order two hundred dollars, value received, with interest, at my residence. T. H. Tompkins." The plaintiff attempted to make title under the indorsement of the payee's name by one Brown. The evidence as to his authority is stated in the opinion.

*J. W. Crane*, for the appellant.

*William A. Beach*, for the respondent.

RAPALLO, J. The nonsuit was granted on the ground that the plaintiff showed no title to the note.

The only witness called to prove the authority of Brown to indorse and transfer the note was Palmer, the payee.

He testified, in substance, that Brown was authorized by him to sell certain patent rights, and to receive notes in payment and transfer them so as not to make him (Palmer) liable in any way. On cross-examination, however, he testified that he furnished Brown with printed blank notes, all payable to bearer, to be used in that business; that Brown had authority to take and transfer such notes, and no others; that he had no authority to take notes payable to order, and write Palmer's name upon them. On further cross-examination it appeared that Brown's authority was in writing. The writing, though called for, was not produced, and the defendant moved, on that ground, to strike out the oral evidence which had been given as to Brown's authority.

The case does not disclose what disposition was made of this motion. But, inasmuch as the judge nonsuited the plaintiff, on the ground of want of title, and held that there was no evidence to submit to the jury on that point, it would, if

## Statement of case.

necessary to support his decision, be intended that he granted the motion to strike out, and regarded the oral evidence of authority as excluded.

In that view of the case, there was no evidence whatever of title to the note, and the nonsuit was properly granted.

The judgment should be affirmed, with costs.

ALLEN, GROVER, and FOLGER, JJ., concur; Ch. J. and PECKHAM, J., do not vote; ANDREWS, J., not sitting.

Judgment affirmed.

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| 45  | 291 |
| 122 | 73  |

THE CONGRESS & EMPIRE SPRING COMPANY, appellant, v.  
HIGH ROCK CONGRESS SPRING COMPANY, respondent.

The owner of a peculiar product of nature like natural mineral water, who has applied to it a conventional name, by which it has become generally known, and under which it has been extensively sold by him as a useful article, is entitled to be protected in the exclusive use of such name as his trade mark in the sale of the article.

Where the spring first known as and named "Congress Spring" produces natural mineral water of peculiar medical and curative properties, possessed by no other spring, the words "Congress Water," and "Congress Spring Water," appropriately indicate the origin and ownership of the water flowing from Congress spring, and the word "Congress" used in connection with the bottling and sale of such water, is a proper and legitimate business trade mark.

Where the plaintiffs are the purchasers of the spring and all interest of the original proprietors who invented and used such trade mark, they are entitled to relief by injunction against sellers of mineral water attempting to appropriate the word Congress as descriptive of the water sold by them.

(Argued March 23d, 1871; decided April 4th, 1871.)

THE appeal is from the affirmance by the late General Term of the Supreme Court, in the fourth district of the judgment of the referee, dismissing the complaint, and excluding proof of the truth of its allegations, on the ground that it did not state facts sufficient to constitute a cause of action.

## Statement of case.

The suit was brought to restrain the defendant from simulating the plaintiffs' trade marks, and to obtain an accounting for the damages resulting from their wrongful appropriation to the use of the defendant.

The complaint alleged, among other things, that the plaintiff is a corporation organized in 1865; that on the 5th of August in that year, it became the owner of the Congress Spring property in Saratoga Springs, and that the waters of that spring are medicinal and efficacious in the cure of various orders of disease.

That it is a mineral spring, which has been known and designated as *Congress Spring* ever since its discovery in 1792.

That its waters were found to have distinctive medicinal qualities, peculiar to that particular spring; and that they retained their efficacy when bottled and carried away.

That there are other mineral springs in Saratoga, but none of them were ever known by the name of Congress Spring; and the waters of no other spring possessed the same curative properties, nor were they known as Congress Water.

That in 1825, the proprietors of Congress Spring commenced the business of bottling and selling its waters under the name of Congress Water; that the business thus established has been continued ever since by the successive proprietors; that the Congress Water so bottled became an article of merchandise, and was sold to a very large extent in the commercial marts of America and Europe.

That during this entire period of more than forty years, the successive proprietors of the Congress Spring property and business, continued the *exclusive use* of the names of "Congress Spring" and "Congress Water," in reference to said spring and the waters thereof, down to the alleged invasion of such right by the defendant, shortly before the commencement of this suit in 1867.

That John Clarke owned the property, and conducted the business individually, and in conjunction with one Lynch, from 1825 to his death in 1846; that his devisees succeeded to the ownership and conducted the business until 1852; that

## Statement of case.

one White then became a part owner, and the business was conducted by him and the devisees, under the name of Clarke & White, until 1865, when the plaintiff succeeded by purchase to the ownership of the property, and has since continued the business.

That from 1825 down, Clarke and his successors in the business used, as one of its trade-marks, the words "Congress Water," with the names or initials of the successive proprietors, respectively, on the corks used in bottling the waters of Congress spring.

That during the entire period the names of the proprietors for the time being were impressed on the bottles in which the water was sold, and the empty bottles, with the successive proprietary marks, on being returned, were refilled with the water of Congress spring.

That during the whole period the successive proprietors put up the bottles for sale in boxes, on the top of each of which was inscribed, by means of a stencil plate, their trade-mark, "Congress Water," with the names of the proprietors for the time being of Congress spring; and on the end of each box was inscribed in like manner a statement, that the words "Congress Water" were branded on the corks of all bottles containing the genuine water.

That the plaintiff invested a large capital in the purchase of the Congress Spring property, and the necessary warehouses and apparatus for bottling the water and preparing it for market; and the business was profitable and remunerative up to the time of the alleged wrongs on the part of the defendant.

That within a few months certain parties organized the defendant's corporation, and the defendant, under the name of "High Rock Congress Spring Company," has, since its organization, commenced the preparation, for sale, of a medicinal water intended to resemble the Congress water, and the sale thereof as Congress water; that it has prepared a very large quantity thereof, and put up the same in bottles for sale, with marks and inscriptions thereon intended to deceive

## Statement of case.

the public, and to induce the belief that the bottles of water so prepared and sold by it are waters of the said Congress spring, and thereby to sell the same as Congress water; that it has opened an office for the sale of the same in the city of New York, under the charge of one Thomas J. Clark as its agent, where it is selling the same to persons who wish to purchase Congress water, as the original Congress water from Congress spring aforesaid; that among the other devices fraudulently contrived by it, thus to deceive the public, it assumed the corporate name of High Rock Congress Spring Company; uses bottles for putting up the water prepared by it of a form similar to those used by the proprietors of Congress spring, with the words "High Rock Congress Spring Water" impressed thereon; that these words are also printed on the corks, and that like inscriptions are made with stencil plates on the tops and ends of the boxes containing the bottles.

That the defendant has prepared a very large quantity of the said mineral water for sale in the manner aforesaid, and by means of the said fraudulent devices, is now imposing upon the public large quantities of a simulated and spurious mineral water prepared by themselves, as the true waters of the Congress spring, and thereby causing an interference with the sale of the true waters of Congress spring by the plaintiff, and depriving it of its just gains on the sale thereof, which, but for the defendant's acts aforesaid, the plaintiff would realize therefrom.

Fac similes of the inscriptions used on the corks, bottles and boxes, in the sale of water by both parties are annexed to the complaint.

*John K. Porter*, for the appellant, cited *Dixon Crucible Co. v. Guggenheim* (2 Brewster Penn. R., 335, 339, 341); 15 New Am. Cyclopaedia, 568; *Lee v. Haley* (Law Rep., 5 Ch. App'ls, 155); *McAndrews v. Bassett* (10 Jurist N. S., 556); *Smith v. Woodruff* (48 Barb., 438); *Dixon v. Fawcous* (3 Ell. & Ell., 537); *Webb v. Rorke* (2 Schoales & Lefroy,

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666; *Sawyer v. Vernon* (1 Vern., 387); Laws of 1863, chap. 209; *Burnett v. Phalon* (9 Bosw., 192); *S. C.* (3 Keyes, 594); *Seixo v. Provezende* (Law Rep., 1 Ch. Appeals); *S. C.* (12 Jurist N. S., 215); *Newman v. Alvord* (49 Barb., 598); *Carter v. Carlile* (20 Beavan, 183).

*William A Beach*, for the respondent, cited Upton on Trade Marks, 86; *Amoskeag Co. v. Spear* (2 Sand., 599); *Fetridge v. Wells* (13 How., 385); *Wolf v. Goulard* (18 id., 64); *Burgess v. Burgess* (17 Eng. L. & E., 257); *Stokes v. Landgroff* (17 Barb., 608); *Partridge v. Manck* (2 Sand Ch., 622); *S. C.* (2 Barb. Ch., 101); *Merrimack Manuf. Co. v. Garner* (2 Abb., 318).

FOLGER, J. The questions involved in this appeal are two :  
1st. Can the owner of a peculiar product of nature be protected in the exclusive use of a name belonging to it alone, and employed by him as his trade mark in his sale thereof?  
2d. Does the name or trade mark used in the case before us by the plaintiffs, indicate the origin, ownership, or place of that product, and is it one in the exclusive use of which the plaintiffs should be protected ?

The general rules of law applicable to these questions do not seem to be controverted. All agree that a name may be used as a trade mark, when it is used as indicating the true origin or ownership of the article offered for sale; and that the owner may be protected in its exclusive use, when it is appropriated as designating the true origin or ownership of the article to which it is affixed; and when others may not use it with equal truth, and have not an equal right to employ it for the same purpose. We do not propose to assert in this case any principle which will conflict with these rules.

The case comes before us on an appeal from a judgment sustaining the dismissal of the complaint made upon the opening of the case for the plaintiffs, with no testimony taken on either side. In this inquiry, all of its allegations are to be taken as true. One of them is, that the names "*Congress*

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*Spring*" and "*Congress Water*," are, and from 1792 have been, used to designate a particular spring of water at Saratoga Springs, and the flow therefrom possessed of very remarkable medicinal qualities peculiar to itself. Another is, that these names have never been applied to any other spring or any other water, and that no other spring nor any other water possesses these peculiar curative qualities. The full strength of these allegations is, that here is a particular article with valuable qualities of exclusive peculiarity, of which the owners of this spring possess the only source, and which can be had only from them. Still another allegation is that this water when bottled preserves all of its qualities, and that it has from 1825 on, become an extensive article of commerce of much profit to the proprietors, and is sought for in the market by these names.

If this water was an artificial compound of worth, of such fame as to be in public demand, and its ingredients and the proportion of their admixture were the result of the study, information and skill of the owner, and known only to him, an imitation of any proper symbol by which he guaranteed to the purchaser the verity and origin of the compound, would be a violation of the rights of both. And why? For that the purchaser has a right to have the very thing which he seeks, and the owner has the right that the very thing sought shall be sold at his profit. It does not alter this right that the compound held for sale and sought for is made by nature and not by art. The owner of its sole place of production is the exclusive owner of it in the last case as in the first. And in the last case, as in the first, the buyer seeks that very thing. And both have the right that the truthful symbol or device which tells of the genuineness of its origin shall not be imitated with intent or effect to deceive. It is the peculiarity of the article, its merit which is individual and exclusive, which attracts the buyer. It is the sole power, from having sole control of the place of origin, to furnish this peculiarity, which is the advantage of the owner, and is his property of value. The trade mark adopted is the indication to the first



of where he may feed his desire, and the protection to the last that he shall keep the profit of being the one who does feed it.

It is true that in most of the cases which have been the occasion of the rules laid down on this subject, the article in question has been artificial. But it will be difficult to show a reason for any of these rules, which does not apply to the proprietorship of a unique product of nature, as well as to that of a unique product of art. If, as has been said, the origin of the right to a trade mark is in the sentiment of natural equity, that within certain limits, imposed by law for the benefit of society at large, every one should enjoy an exclusive profit in the result of his powers of invention, ingenuity or skill: that sentiment is as well invoked to protect every one in the enjoyment and profitable use of the property in a peculiar natural product which he has acquired with the avails of his industry, sagacity and enterprise. Sometimes it is said that the essence of the injury is fraud upon the owner, be he the owner who alone can make, or the owner who alone can sell, a specific article artificial. It is as much a fraud to injure the owner who has and sells a specific article, whose natural source is his alone. The court interferes to protect the plaintiff who has an exclusive right to use any particular mark or symbol in connection with the sale of some commodity. It is because it is his property for the purpose of such application. For the benefit of the vendor the application of the mark or symbol may be as well to a vendible commodity natural as to one artificial; and thus the vendor of the one equally with the vendor of the other have a right in his mark. In *The Amoskeag Manuf. Co. v. Spear* (in 2 Sandf. 599), it is said that "every merchant for whom goods are manufactured has an unquestionable right to distinguish the goods he sells by a peculiar mark or device." He has used his capital to buy the exclusive right to vend for his own profit the peculiar product of another's skill. He has devoted and is giving his time, energy, and sagacity to extending the sale of it, with the hope and expectation of that profit. No

reason presents itself why he is entitled to protection in the exclusive use of the symbol which designates that product of another's skill, more than one who with equal capital, energy and sagacity, has purchased the sole place of origin of a peculiar product of nature, and is engaged in the sale of it for profit. Both are so entitled.

It is held that the right of property in a trade-mark can be said to exist only, and can be tested only, by its violation. But its violation is when one adopts or imitates, and applies to an article of his manufacture, the name or mark previously used by another as a designation for his production. The wrong done is the sale by the first of his goods as and for the goods of the last. The violation and the wrong are the same, whether the commodity is one which the hand of man has made, or which nature has put into the hand of man. Certainly so, if into the hand of but one man has it been put. It is a matter of property, and the profitable use of property. If one use the name of another for the purpose of securing to himself in the disposition of property advantages which belong to that other, the fraud is complete, and the remedy ought to be complete. (*The Collins Company v. Cohen*, 3 Kay and Johns, 428.) It cannot make a difference, if the property comes by the purchase of its sole place of natural origin, or by the possession of the sole power of producing it by human effort. And in accordance with these views are the following authorities, in which the commodity in question was a simple native product, unaltered by any process of art in the inherent quality infused by nature, which made it desirable to buy and profitable to sell. (*Seixo v. Provezende*, Law Rep., 1 Chy. App. 192; *Newman v. Alword*, 49 Barb., 597; *Dixon Co. v. Guggenheim*, 2 Brewster [L'enn.], 335.)

The first two cases further resemble the one before us, in that the proprietor of the commodity was the owner of the place of its product, and the name of that place was a prominent and controlling part of the trade-mark.

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In *Lee v. Haley* (39 Law Jour. Chy. 284; S. C. Law Rep, 5 Chy. App. 155), the plaintiffs were dealers in coal, not claiming that they had an article of specific and peculiar merit, but only that by their care and attention to business, they had secured and attached a set of customers who dealt with and knew them by the business, style and address which the defendant had copied. The article dealt in was a natural product, in the general reach of all dealers, acquiring no merit from the manipulation of it by the plaintiffs; and strictly the authority in this connection goes only to the effect that the good will of a business represented by a particular style of address, may be protected from the interference of an imitation of that address. Even in that view it would be applicable to the case at hand. But we prefer to place our decision distinctly upon an affirmative answer to the first question above stated.

These names of "Congress Water" and "Congress Spring Water," have, as the complaint alleges, ever since 1825 been used and enjoyed by the proprietors of this spring in reference to it and its waters exclusive of all other persons; and upon the bottles containing the water, upon the corks of the bottles, and upon the boxes in which the bottles are packed for transportation, have the successive proprietors, from that time down, used a form but slightly varying of words and letters as proprietary marks denoting the contents thereof, and under the use of these marks traffic and sale thereof has become profitable, yielding a handsome revenue. Keeping in mind the facts established for the purposes of this case by the allegations of the complaint, that there is but one Congress spring, and but that one spring from which does flow Congress water, exclusively possessed of these peculiar curative medicinal qualities; and there can be no question but that these proprietary marks, adopted and used by the plaintiffs and their predecessors, do indicate the true origin and ownership of this water, and that they have been, and are now appropriated, as designating the true origin and ownership of the article to which they are affixed. And whatever may be the counter

allegations of the defendant's answer, and whatever it may be in their power to show upon the trial of an issue, the fact as presented to us by the complaint is, that of the numerous other mineral springs at Saratoga, none of them possess the peculiar curative properties of that owned by the plaintiffs, nor was any of them ever called by the name of Congress spring, or the waters thereof called Congress water, so that none other than the plaintiffs may use the proprietary marks adopted by them, upon any article of water but theirs with equal truth, nor has any an equal right to employ these marks. These marks designate the name of the water to which they are applied; they designate not only its general, but its peculiar distinctive and popular quality; and they designate its origin, ownership and place of product. Not merely that it comes from Saratoga, and is of a general character common to all the waters of that place, but that it has a specific and individual character and quality belonging alone to this spring, and which has its origin nowhere else.

By the application of capital, business sagacity and enterprise, this spring and its product have become extensively known and favorably received. That product is sought after and received by this name. It is not to trust to our common apprehension of things to believe that one who wishes for the medicinal water which he has used before, or heard of, as coming from the Congress spring at Saratoga, does not mean that specific water when he inquires for it by its specific name. And it is this name, the trade-mark of the plaintiffs, which is the short phrase between buyer and seller which indicates the wish to buy and the power to sell water from that origin, that place, of that ownership. This phrase, this device, is the trade-mark of the plaintiffs, and is of value to them, as thus designating at once this their own particular article of sale, and guaranteeing the verity of its origin. They have the right to be protected in its exclusive use, for under the facts as shown by complaint none other can use it with equal truth, and none other has equal right to employ it for the same purpose.

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annexed to the complaint tend to show that the using marks and inscriptions which do respects those previously adopted by the plaintiffs, predecessors, and which in some respect are an imitation, not warranted by anything presented to us on the argument appearing in the papers. The complaint shows the intent of the defendants to deceive the public by certain marks and inscriptions of a form similar to those of the plaintiffs, and to induce the belief by it that the article sold by the defendants is the same article sold by the plaintiffs, and that they are selling the same to persons wishing to buy it, as the original Congress water, from the Congress spring of the plaintiffs, to the damage of the plaintiffs. It is not necessary for us to examine closely the allegations. This is not a question as to the continuance of an injunction order restraining the defendants, but one whether the plaintiffs shall be allowed to make proof upon the issues raised by the pleadings. We think the allegations for the complaint sufficient for that purpose.

A motion to dismiss a complaint, for that it does not allege facts sufficient to show a cause of action, is in the nature of a demurrer *ore tenus*. And in that view we think the complaint avers sufficient facts to show a cause of action and to permit the plaintiffs to make their proofs.

It is insisted by the learned counsel for the respondents that the complaint avers no fact which shows that the appellants acquired the right to use the marks and emblems of their predecessors. The complaint avers that the appellants purchased the spring. It does not, by any distinct and special allegation, aver that they bought the business, or the good-will, or the right to use any particular marks or inscriptions, or any of the chattel property connected with or used in the business. The averment that the different proprietors have been in the habit of repurchasing the bottles from consumers of the waters and refilling them, and selling them again thus refilled, does not come up to such an allegation. But the complaint does aver that the spring was sold to the plaintiffs in 1865, and shows

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what were, from that time, the marks and words with which they sold. And, for the trade-mark thus adopted, they have the right to ask protection. It avers matter which, if proven, tends to establish an interference on the part of the defendants with this trade-mark; so that, if the right to use the trade-mark of the first and intermediate proprietors and vendors of the water from this spring is not established, the plaintiffs may be able to establish such an imitation of the marks and devices which they have adopted as calls for the interference of the court. A property in trade-mark may be obtained by transfer from him who has made the primary acquisition; though it is essential that the transferee should be possessed of the right either to manufacture or sell the merchandise to which the trade-mark has been attached. (Upton on Trade-marks, 52.) And it may also pass, by operation of law, to any one who, at the same time, takes that right. (*Dixon Co. v. Guggenheim, supra*; and see *Brooks v. Gibson*, 34 Beavan, 566.)

The plaintiffs purchased of the former proprietors the spring. They took the whole property in it. They thus obtained that which was the prime value of it; the exclusive right to preserve its water in bottles, as an article of merchandise, and the exclusive right to sell it when bottled. Thus they acquired the business of their predecessors; for, the plaintiffs owning the spring, no one else could carry on the business. And, under the rules above stated, they acquired, by assignment or operation of law, the right to the trade mark before that, in use to designate the article upon which this business was carried on. (See, also, *Hall v. Burrows*, 10 Jur., N. S., 55.)

We are, therefore, of the opinion that the plaintiffs should have been allowed to adduce proofs in substantiation of the averments of their complaint.

It follows, that the judgment of the court below should be reversed, and a new trial granted, with costs to abide the event.

All the judges concurring, judgment reversed.

ORRIS WHITNEY, Respondent, v. THE NATIONAL BANK OF  
POTSDAM, Appellant.

The plaintiff purchased from the defendant the supposed note of W., giving his own in exchange. In an action brought by him against W., upon the purchased note, judgment went against him for costs, it being found that the signature was a forgery. The plaintiff, being sued upon his own note by the holder to whom the defendant had transferred it, defended on the ground of want of consideration, and judgment went against him for the value of the note and costs. In his action against the defendant that he could recover, together with the amount paid by him in satisfaction of his note, the costs of his unsuccessful action against W. (in which the defendant had notice), but not the costs of his unsuccessful action upon his own note.

(Argued March 31; decided April 1, 1871.)

APPEAL from the late General Term of the Supreme Court in the Fourth judicial district.

The action was to recover the amount paid in satisfaction of a promissory note given by the plaintiff to the defendant, as alleged, and as the jury have found, upon the purchase of a note made by one Joseph Whitney, and purporting to have been indorsed by one Daniel Whitney, and the costs of the prosecution and defence of a suit upon the plaintiff's note, which was transferred by the defendant before due, and upon which a judgment was recovered against the plaintiff, and also the costs of an unsuccessful action against Daniel Whitney upon his indorsement, in which the plaintiff was defeated for the reason that the indorsement proved to be a forgery. The plaintiff had judgment upon the verdict of the jury for the whole amount claimed, which judgment was affirmed at General Term, and the defendant has appealed to this court.

*W. H. Savage*, for the appellant.

*C. O. Tappan*, for the respondent.

ALLEN, J. Two questions of fact were litigated upon the trial, and were submitted to and passed upon by the jury:

1. Whether the plaintiff, upon the occasion of giving his note to the defendant, which he was subsequently compelled to pay, purchased and took title to the note purporting to have been indorsed by Daniel Whitney, or whether he gave his note in payment and satisfaction of that note; and, 2. Whether the indorsement of Daniel Whitney was genuine or a forgery.

These questions were distinctly submitted to the jury, and they have found both in favor of the plaintiff, that is, that the indorsement was forged, and that the plaintiff did purchase and take title to the note, and did not pay and satisfy the same. Both parties acting in good faith, and supposing the indorsement to be genuine, the plaintiff was entitled, upon these facts, to recover the amount paid upon the purchase, with the interest thereon. (*Herrick v. Whitney*, 15 Johns., 240; *Canal Bank v. Bank of Albany*, 1 Hill, 287; *Coolidge v. Brigham*, 5 Metc., 68.) The plaintiff gave the defendant, in payment for the purchased note, his own note, payable in sixty days, which note, before maturity, was transferred in the ordinary course of business, and for value. The note being dishonored, an action was brought thereon by the holder, which was defended by the present plaintiff, and a recovery had against him; and, under an objection and an exception properly taken, he was permitted to recover in this action, as well the costs included in that judgment against him, as the costs and expenses incurred in the defence. For this, there is no authority; and it cannot be sustained upon principle. He defended the action for his own benefit, and took the chances of the experiment to impeach the title of the holder, so as to make the want of consideration a defence; and, failing, he cannot charge the expense of the litigation upon the defendant. These costs were not a necessary result of the breach of warranty of the genuineness of the note transferred. The damages that may be recovered in an action upon a warranty are those, and only those, that are incident to, and result from, the breach of the warranty.

The defendants had transferred the note, and payment to the holder would have given the plaintiff his action, and he



should have paid it and taken his remedy over against the defendant. The costs of that action were not the result or a consequence of the breach of the defendant's contract of warranty, but of the plaintiff's default in the performance of his own contract to pay his note to the holder. These costs should have been disallowed.

The costs of the action against the indorser upon the forged indorsement, and which were made and incurred in the attempt to establish the genuineness of the note which the defendant had transferred as genuine, and warranted as such, are upon a different footing. There was no question made upon the trial as to the good faith of that action or that it was collusive, and although the judgment was not treated upon the trial as evidence of the forgery, it probably might have been accepted as conclusive evidence of that fact, the defendant having had notice of the action and an opportunity to take part in its prosecution. But evidence was given on both sides as to the genuineness of the indorsement and the question submitted to the jury as an open question. The case shows that the defendant claimed and earnestly insisted at all times that the indorsement was genuine and the note valid against all the parties to it, and claimed that, if there was to be any litigation, it must be between the plaintiff and Daniel Whitney, whose name was upon the note as indorser. There is nothing to distinguish this case from *Delaware Bank v. Jarvis* (20 N. Y., 226), or take it out of the ordinary rule applicable to cases similarly circumstanced. Whether the transferee of a note is bound to bring an action and have an adjudication as to its validity before he can recover of the transferor upon the implied warranty of its validity may be doubtful, but that he is at liberty to do so, and if defeated may recover the costs incurred by him from his assignee, is well settled. The plaintiff is entitled to the benefit of this rule. There should be deducted from the recovery the amount included therein for the costs in the action upon the plaintiff's note. The judgment should be reversed and a new trial granted, costs to abide event, unless the plaintiff remits from

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the recovery \$344.19 as of the date of the verdict, and in case that sum is deducted the judgment should be affirmed for the balance without costs to either party upon this appeal.

GROVER, PECKHAM, FOLGER and ANDREWS, JJ., concur.

GROVER, J., was also inclined to the opinion that the costs of the plaintiff's suit on the indorsement should be deducted. Chief judge did not hear the argument.

Judgment according to the opinion of ALLEN, J.

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| 114   | 330 |
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| 45    | 306 |
| 173   | 416 |

HENRY R. MYGATT, Respondent, v. LUCINDA WILCOX and another, Appellants.

The statute of limitations does not begin to run upon the claim of an attorney for services and disbursements until the termination of the proceeding in which they were rendered and disbursed, where his employment was to conduct such proceeding to its termination.

Executors and administrators are personally liable for the services of an attorney on their final accounting, rendered upon their retainer.

Administrators, who retain an attorney to attend for them in proceedings against them on a final accounting before the surrogate, are jointly liable to such attorney, although their interests upon a distribution are different.

Interest is recoverable upon an attorney's account from the time it is rendered to the client.

(Submitted March 29th, and decided April 11th, 1871.)

APPEAL from the judgment of the late General Term of the Supreme Court in the sixth judicial district, affirming a judgment for the plaintiff upon the report of a referee.

This was an action brought by the plaintiff, for professional services rendered, and disbursements as an attorney and counselor-at-law, for the defendants. The answers were a general denial, and the statute of limitations. The defendant, Lucinda Wilcox, further answered that the plaintiff agreed that she should not be personally liable for services and disbursements, but that the plaintiff would look to and depend solely upon the estate of Whitman Wilcox, Jr., deceased.

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The defendants and one Elisha B. Smith were the administratrix and administrators of said Whitman Wilcox, Jr., deceased. The plaintiff was employed in November, 1852, by the defendants, as their attorney and counsel in the Surrogate's Court of the county of Chenango, and before an auditor appointed by the surrogate, and also in the Supreme Court, and in the County Court of Chenango, and continued in the employment of the defendants, as said attorney and counsel, from November, 1852, until the 26th day of February, 1866.

The proceedings in the Surrogate's Court were upon the final accounting and settlement of the said administratrix and administrators, requiring a large amount of time and attention during the years 1852 to 1855, in that court, and before the auditor; which services in court were all rendered at places at distances from the residence of the plaintiff. Services were also rendered on appeal in the Supreme Court, during the years 1856 and 1857. In January, 1858, the General Term reversed the decree of the surrogate, when the whole case was ordered to be reheard by the surrogate of Chenango. On the 26th of February, 1866, the proceedings in Surrogate's Court were settled by the parties, and ended. This action was brought May 2d, 1867.

The plaintiff was employed by the defendants in the County Court, on a motion to issue an execution against Elisha B. Smith. A reference was ordered therein, in April, 1857, which reference was never executed, but the claim was settled by the parties, with their other matters in controversy, on the 26th of February, 1866.

The referee finds that the plaintiff was employed at the time aforesaid by the defendants, "to conduct the proceedings in the Surrogate's Court to their termination, and to take charge of their interests in the estate of the Whitman Wilcox, Jr., deceased," and that said proceedings and interests were not settled or terminated until the 26th day of February, 1866.

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The reasonableness of the plaintiff's charges was not contested.

There was a report for the plaintiff, with interest upon the several disbursements from the time they accrued, and with interest upon the allowances for professional services from the settlement of the 26th day of February, 1866

The defendants severally filed exceptions to the decision of the referee.

On appeal, the General Term reversed the judgment entered upon the report of the referee, unless the plaintiff should stipulate to remit \$281.33 from the judgment at its date, so as to leave the judgment for damages \$2,090, besides cost, in which case said judgment to be affirmed, without costs of the appeal to either party.

The plaintiff served the stipulation remitting said \$281.33 from the judgment at its date, and perfected judgment on said appeal for \$2,090 damages, and the costs in the court below.

From that judgment this appeal was taken by the defendants.

*D. L. Follett and Isaac S. Newton, for the appellants.*

*Henry R. Mygatt, in person.*

GROVER, J. It was conceded by the appellants, upon the trial, that the services of the respondent were reasonably worth the amount charged by him therefor. The questions raised by the exceptions are, whether the demand was barred by the statute of limitations; second, whether the appellants were liable therefor personally or only in their representative capacity; and third, if personally liable, whether they were so jointly. The demand of the respondent was not, nor any part thereof, barred by the statute, although more than six years had elapsed after the respondent was employed by the appellants as their attorney and counsel to attend to the proceeding instituted against them in the Surrogate's Court,

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and to the appeal taken from the decree rendered by the surrogate to the Supreme Court, and after such decree had been reversed by the Supreme Court, and a rehearing ordered by the surrogate. The statute did not begin to run upon the demand for these services, and disbursements paid by the respondent, until the termination of the proceeding before the surrogate, by the settlement made by the parties. This results from the nature of the employment of the respondent by the appellants, which was to attend to the proceeding from the time of his retainer until its final determination, unless sooner terminated by the act of one of the parties. (3 Parsons on Contracts, 93; 11 Eng. Law & Eq., 587; 4 Binney, 339; *Whitehead v. Lord*, 7 Exchequer, 691; Angel on Limitations, § 120; *Hall v. Wood*, 9 Gray, 60.) *Adams v. The Fort Plain Bank* (36 N. Y., 255), cited by the counsel for the appellants, so far from conflicting with this rule, really sanctions it. The ground upon which it was held in that case that certain portions of the plaintiff's demand were barred by the statute, was that the suits in which the services were rendered had been finally determined more than six years prior to the commencement of the action, and that the statute commenced running upon the services in each suit upon its termination, although the plaintiff had been employed in other suits by the defendant, which were pending and not terminated until within the six years. The appellants were personally liable to the respondent for his services, although the proceeding in which he was employed by them was instituted against them as administrators. The services were rendered at their request, and there was no pretence that the respondent agreed to look to the estate represented by them for payment therefor, or that they undertook to make the estate liable to him, if, indeed, they had power to make it liable to him therefor. A party who employs an attorney is personally liable to him for his services, although acting as a trustee or in a representative capacity in the business in which he employs him. (*Bowman v. Tallman*, 2 Robertson, 385, and authorities cited.) The appellants were liable jointly.

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Statement of case.

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They were joint parties to the proceedings in which the services were rendered, and jointly retained the plaintiff. The fact that their interests upon a distribution of the estate were different was wholly immaterial. The plaintiff was entitled to recover interest upon his account, after it was rendered to the appellants. Then it should have been paid. (*Adams v. The Fort Plain Bank, supra.*) It appears that the referee made a mistake of \$200 in footing the account of the respondent for services, in his favor. This mistake was for the first time pointed out by the counsel for the appellants in this court. It may well be doubted whether the exception taken to the report of the referee was sufficiently specific to make the error available in this court; but without considering this point, as the respondent has by stipulation consented to its correction, the judgment must be modified by reducing the amount \$200, and the interest allowed thereon by the referee, and, as so modified, affirmed, with costs.

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IN THE MATTER OF THE HARMONY FIRE AND MARINE INSURANCE COMPANY.

An order having been granted by the Supreme Court, under section 56 of the article two of the Revised Statutes in reference to proceedings against corporations in equity (2 R. S., 466), requiring all the creditors of a corporation to exhibit their claims, and become parties to the suit, within six months from the first publication thereof, or in default thereof be precluded from distribution—*Held*, that, at the expiration of the time fixed, a creditor, who had failed to present his claim, was wholly excluded from any share in the assets, and this although he had delivered an account of his claim in accordance with section 81 of article 3 of the same title (2 R. S., 471) before the second dividend.

(Argued March 21st, and decided April 11th, 1871.)

APPEAL from an order of the General Term of the Supreme Court in the first district, affirming an order of the Special Term, denying the prayer of the appellant's petition.

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Statement of case.

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On the 19th day of February, 1866, the Harmony Fire and Marine Insurance Company, which was a New York corporation, issued its policy for \$7,500 to Wm. McLoon, insuring his ship "Young Mechanic" for a voyage from Boston to Hong Kong. In the course of her voyage, and while off the coast of South America, the ship was destroyed by fire, on or about the 10th April, 1866. In July of the same year, the company filed a bill in equity in the Supreme Court of Massachusetts, alleging, among other things, that the loss was caused by the fraud of McLoon, and praying that he be ordered to surrender and cancel the policy. McLoon answered the bill. Issues of fact were framed, submitted to a jury and determined in favor of McLoon, whereupon the court dismissed the bill with costs, at the October term 1868.

Pending the proceedings in equity, McLoon brought his action at law in the same court in April, 1868, to recover his insurance money. In this action the company appeared and defended by the same attorney who represented it in the proceeding in equity. This action was also tried before a jury, and in May, 1869, McLoon recovered judgment against the company for \$8,555.62. Thereupon execution was issued on the 20th day of May, 1869, for \$8,596.44 and interest from May 15, 1869. Failing to collect anything by means of the execution in Boston, where it was issued, the plaintiff sent it to New York about the 1st of July, 1869. He then learned that the property of the company was in the hands of receivers. After the company had filed its bill in Boston, but before the action at law was there commenced against it, on the 14th day of December, 1866, T. James Glover and Arthur Leary were by an order of the Supreme Court of this State appointed receivers of the property of the company, on the petition of a stockholder under the provisions of original sections 39, 40 and 41, article 2, title 4, chapter 8, part 3 of the Revised Statutes (5th ed., vol. 3, p. 764); on the 27th day of October, 1868, the receivers obtained an order of this court, under the provision of original section 56 of the statute above-mentioned, requiring all creditors to

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Statement of case.

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exhibit their claims and become parties to the proceedings within six months from the first publication of the order, or be precluded from the benefit of any decree that might be made in the proceedings; directing the publication of the order for six months in the *Journal of Commerce*, and appointing a referee for the purposes of the order, to hear and determine claims etc. The six months expired on the 18th of June, 1869. The notice given in pursuance of the order required creditors to exhibit their claims on or before June 23d, 1869. The referee made his report June 29, 1869, and on the 30th of June 1869, an order was made precluding from the benefit of any decree in the proceedings all creditors who had not exhibited their claims and become parties to the proceedings according to the directions of the order of October 27, 1868. The same order of June 30, 1869, which thus shut out all creditors who had not then filed their claims and been admitted as parties, directed the receivers to make a second and final dividend of twenty-eight per cent; a dividend of twenty per cent having been previously declared. The second dividend was by the receivers made payable July 24, 1869. All the dividends directed were paid, excepting a sum of \$69.19 unclaimed, and the liquidation of the affairs of the receivership leave a surplus sufficient to pay upon McLoon's claim a per centage equal to that paid as dividends to other creditors.

About the first of July 1869, after the expiration of the six months allowed by the order of October 27, 1868, for creditors to come in, but before the second dividend, McLoon's claim was presented to the receivers, who, however, refused to admit it or give him any satisfaction whatever.

Thereupon McLoon petitioned the court, praying leave to prove his claim in such manner as the court should direct, and that the receivers be directed to pay upon it the same per centage as had been paid to other creditors, and that he have such other and further relief, etc. On this petition the court directed the receivers and referee to show cause why the prayer should not be granted, and why the petitioner should



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Opinion of the Court, per GROVER, J.

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not be allowed to come in and prove his claim, and why the receivers should not pay dividends thereupon, and why the petitioner should not be allowed to bring his action against the receivers to enforce his claim, and why he should not have such other and further relief, etc. On the return of the order to show cause the court denied the motion of the petitioner, on the ground that "the statute excludes all claimants who do not present their claims within the time fixed by the second notice. The statute imposes a limitation in presenting claims to the receiver, and disposes of the fund to other parties. If claims can be admitted afterward, the receiver is prevented from complying with the statute in this respect."

The court at the same time intimated that it would exercise a discretionary power in favor of the petitioner, if the statute had not prevented the exercise of all discretion.

On appeal to the General Term, the order was affirmed, and thereupon the petitioner, McLoon, appealed to this court.

*Thomas C. Hubbard*, for the appellant, upon the point that the court below had power to relieve the petitioner and let him in, notwithstanding default, cited *Judson v. Rossie Co.* (9 Paige, 597, 600); *Matter of the City Bank of Buffalo* (10 Paige, 378, 382); *Russell v. Lane* (1 Barb., 519, 523); *Pratt v. Rathbun* (7 Paige, 269); *Warner v. Hoffman* (4 Edw. (Ch., 381, 389); *Greig v. Somerville* (1 Russ. & M., 339); *Angell v. Haddon* (1 Madd., 529); *Sashley v. Hogg* (11 Ves., 602). And deciding otherwise was error. (*Hall v. Emmons*, 9 Abb. Pr. R., N. S., 370; *Russell v. Conn*, 20 N. Y., 81.)

*Joseph H. Choate*, for the receivers.

GROVER, J. Section 56 (2 R. S., 466), among other things, provides that the court may, whenever it shall appear necessary or proper, order notice to be published in such manner as the court shall direct, requiring all the creditors of such corporation to exhibit their claims and become parties to the suit within a reasonable time, not less than six months from

the first publication of such order, and in default thereof to be precluded from all benefit of the decree which shall be made in such suit, and from any distribution which shall be made under such decree. Upon the hearing of the petition of the appellant by the Special Term it was shown that an order pursuant to the preceding section, requiring creditors of the corporation to exhibit their claims, had been made by the court and published in the manner required, and that the time thereby fixed for creditors to present their claims to the receiver had expired before the petitioner presented his demand. This requires a determination whether by the act it was intended to exclude such creditors of the corporation as failed to present their claims within the time fixed by the order from all claim upon the assets in the hands of the receiver and distribute such assets among those creditors only who presented their claims within the time limited by the order. Upon this question there can be but little doubt. It would be absurd to suppose that the legislature intend to confer power upon the court to make an order in these proceedings excluding creditors who failed to comply therewith from all participation in the assets, and that such order should not have such effect upon creditors so failing. It is quite as manifest that the intention was to exclude those not complying, as though the statute had in express terms declared that such creditors should be excluded. Were the section under consideration the only statutory provision having a bearing upon the question, the only conclusion must be that the appellant was excluded, and his petition therefore properly denied. But it is insisted that the provisions of article 3, for the distribution of the assets, are applicable, although the proceedings in the present case were instituted under article 2. In this position I think the counsel is correct. Section 37 of the act provides that upon a final decree the court shall cause a just and fair distribution of the property of the corporation and of its proceeds to be made among its creditors, etc., who shall be paid in the same order as provided in the case of a voluntary dissolution of a corporation. The latter is provided for in article

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3 of the title. Section 42 provides that the receiver shall possess all the powers and authority conferred, and be subject to all the obligations and duties imposed by article 3 upon receivers appointed under the latter article. These sections show that the distribution of the assets are to be regulated by the provisions of article 3 taken in connection with those of article 2 upon the same subject. It is further insisted by the counsel for the appellants that he was entitled to the relief prayed for under section 81 of article 3. That section, among other things, provides that every creditor who shall have neglected to exhibit his demand before the first dividend, and who shall deliver his account to the receivers before such second dividend, shall receive the sum he would have been entitled to on the first dividend before any distribution be made to the other creditors. It is insisted by the counsel that this qualifies section 56, article 2, and secures to creditors who present their claims before the second dividend is declared the right to share in the distribution of the assets, although he may not have complied with an order made pursuant to the latter section. I cannot concur in this position. Such construction would render section 56, article 2, entirely nugatory, as it will be seen that by the subsequent sections of article 3 all creditors failing to present their claims before the making of the second dividend are excluded. By this construction it will be seen that no effect whatever can be given to section 56, article 2, as under the construction contended for, no creditor can be excluded who presents his demand before the making of the second dividend, and all who do not are excluded by the subsequent sections of article 3. The true meaning of the latter clause of section 81, article 3, is that all creditors neglecting to present their demands before the first dividend is made and who are not precluded from presenting them by section 56, article 2, may, upon presenting them before a second dividend is made, share in the distribution upon an equality with those who participated in the first dividend. By this construction full effect is given to both sections of the statute without any conflict. It is further

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Opinion of the Court, per GROVER, J.

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insisted by the counsel that although he may have been excluded by section 56 from receiving a *pro rata* share of the assets, yet that the court had power in its discretion to relieve him therefrom by extending the order, and that as it appears that the court did not exercise its discretion upon the subject, holding that his rights were fixed by the statute, over which the court had no discretion, and that therefore he is entitled to a reversal of the order, so that upon a rehearing the discretion of the court may be exercised. The legal inference is correct. Whenever the court of original jurisdiction is vested with discretion and refuses to exercise it, it is an error which it is the duty of the Appellate Court to correct, and if not corrected by the General Term, it will be by this court. But the rights of all parties were fixed by section 56, article 2. The appellant was thereby excluded from participation in the assets. The creditors who presented their demands acquired a vested right to have the assets distributed among them to the extent of their demands, and the court had no discretion to deprive them either partially or wholly of these rights. If wrong in this, there is nothing showing but that the General Term did exercise its discretion upon this matter in the affirmance of the order. If the Special Term erred in refusing to exercise discretion in a case where it was required so to do, it was the duty of the General Term to correct the error by making such order as the Special Term ought to have made, and this court can only interfere with the order where it appears that the General Term have failed to discharge this duty. There is nothing in the present case showing such failure by the General Term. Section 88 provides that if, after making the second dividend, any surplus shall remain, the same shall be distributed among the stockholders. This surplus obviously is a remainder after the creditors are paid in full, and as it conclusively appears in the present case that there will be no surplus, the question whether the appellant has any right to share therein does not arise. The counsel further insists that he is entitled to share in the distribution of any of the fund reserved by the receiver to satisfy

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Opinion of the Court, per GROVER, J.

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litigated claims against the corporation which shall remain after the satisfaction of such claims. Sections 82 and 84 of article 3 show that he has no such right. It may be said that the appellant's is a hard case. This is true, but it is impossible to distribute the assets of an insolvent corporation among its creditors in the absence of rules excluding such creditors as neglect to present their demands within such time as shall be prescribed for that purpose. The statute has established such rules, and all that is left to the courts is to administer them. They have no discretionary power of dispensation in cases of hardship. The order appealed from must be affirmed with costs.

ALLEN, J. Section 56 of article 2 of the Revised Statutes, entitled "Of proceedings against corporations in equity" (2 R. S., 466), was designed for the benefit of creditors, and to enable those interested to wind up the affairs of an insolvent corporation with as little delay as possible. It authorizes a procedure complete and perfect in itself, for the ascertainment of the claims against the corporation, and a distribution of the assets among creditors. Proceedings being had under this section, resort cannot be had to other statutes for a guide and directory to the receiver. The directions of *article 3*, of the same title, which is entitled "of the voluntary dissolution of corporations," to receivers as to the time and manner of distributing the assets are inapplicable. Under section 56 the court undertakes the distribution, and declares by its judgment, the rights of claimants.

The order prescribing the time for presenting claims, and declaring the consequences of the omission to present the claims, is authorized by law and obligatory upon all. This followed by the order and judgment, the regularity and legality of which is not disputed, declaring the rights of creditors, and absolutely barring those who have not come in under the first order of their claims is final, and effectually excludes all who have not presented their claims.

## Statement of case.

The court in this case directed the first, second and final dividends of the assets, and while the court might in its discretion, have relieved the petitioner from the consequences of his laches, and permitted him to share in that part of the estate that had not been distributed, it is not the province of this court, to review the exercise of that discretion. I concur in the result, and for these reasons agree to the affirmance of the order.

All concur in the result.

FOLGER J., concurred in ALLEN's opinion.

The other judges were not understood as expressing any opinion upon the power of the court below to relieve the petitioner.

Order affirmed.

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MORDECAI ADAMS, respondent, v. ORRIN OUTHOUSE, appellant.

A promise to pay money made by one to another of several next of kin, to induce the latter to acquiesce in the administrator's account of the estate as presented, and receive the distributive share appearing in that account, and to refrain from taking proceedings to compel such promisor to account for other personal property of the intestate, alleged to have been appropriated by him, is void, if made without the knowledge of all the distributees.

Such a promise is within the principle which avoids all promises and agreements by which one creditor, uniting in a composition deed, seeks to secure an advantage over the other creditors. In such a case, the promisee was estopped from alleging that there was no foundation for the claim made against the defendant as to the appropriation of the estate, and that all the property was actually distributed.

The rule is absolute, which disables every one, acting with others in a matter of common interest, from securing to himself any profit or advantage over his associates by any secret or undisclosed agreement or understanding.

(Argued March 28d; decided April 4th, 1871.)

THIS is an appeal from the judgment of the late General Term of the Supreme Court of the Seventh judicial district, affirm-

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Statement of case.

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ing a judgment in favor of the plaintiff, entered upon the report of Scott Lord, sole referee.

The action was upon several claims assigned to the plaintiff: one for money loaned to the defendant by one Ira Outhouse; one for moneys due upon a settlement and account stated for board, use of horse, and other matters growing out of the joint occupation and cultivation of a farm by the defendant and Ira Outhouse; one for a small balance due Ira Outhouse from the defendant for interest, and which the latter had promised to pay; and lastly, for two sums of \$150 each, which the defendant had promised to pay to Ira Outhouse and Abbey Jane Adams, respectively, under the following circumstances: In May, 1865, William Outhouse died intestate at Canandaigua, leaving him surviving several children, and among them the defendant, and Ira Outhouse and Abbey Jane Adams; and letters of administration had been granted to the widow of the intestate and Thomas B. Lyon. In January, 1866, the defendant, his brother and sister above named, and others the next of kin, met, by appointment, the administrator and administratrix, for the purpose of an amicable settlement and division of the estate, and the administrator and administratrix presented a statement of the personal estate which had come to their hands. Ira Outhouse and Mrs. Adams, severally, and without the knowledge of the other children and next of kin, charged the defendant with having appropriated to his own use a considerable portion of the personal estate of the deceased, for which he should account to the representatives, and refused to come to any settlement, or agree upon a distribution of the estate, unless the defendant would account for the property so appropriated and which should come into the distribution, and threatened a suit to compel an accounting. The defendant thereupon, on consideration that Ira Outhouse and Mrs. Adams would agree to a settlement and accept their share and portion of the assets that had come to the hands of the administrator and administratrix, and agree not to prosecute or take any proceedings against the defendant in respect of the

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Opinion of the Court, per ALLEN, J.

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claim then made, agreed to pay to each \$150; and they assented, and accepted their portion of the estate as distributed by the administrator and administratrix, and made no further claim upon the defendant.

The agreement was, by an understanding between the parties, concealed from the other children and next of kin. The action was tried by a referee, who gave judgment for the plaintiff for all the claims; and from the judgment of the Supreme Court affirming that judgment the defendant has appealed to this court.

*E. G. Lapham*, for appellant. The case is like a composition with creditors, and a secret understanding on the part of one of them. Such a secret understanding is fatal to the validity of any promise based upon it. (*Russell v. Rodgers*, 10 Wend., 473; *Breck v. Cole*, 4 Sand., 79; *Carroll v. Shields*, 4 E. D. Smith, 466.)

*J. B. Adams*, for respondent. The compromise of a doubtful claim is a good consideration for a promise to pay money, and it is no answer to show that the claim is not a valid one. (*Evans v. Hunter*, 28 N. Y., 389; *Russell v. Cook*, 3 Hill, 504; *Stewart v. Ahrenfeldt*, 4 Denio, 189; *Palmer v. North*, 35 Barb., 282.) The compromise itself proves, *prima facie*, an acknowledgment by the defendant that there was color for their objections. (*Seaman v. Seaman*, 12 Wend., 381.) If partners have settled their partnership transactions, and have struck a balance, which one has promised to pay the other, the latter may sue at law to recover that balance. (*Clark v. Dibble*, 16 Wend., 601; *Powell v. Noye*, 23 Barb., 184. See *Glover v. Tucker*, 24 Wend., 153.)

ALLEN J. Upon the facts proved by the referee, the claims other than that upon the promise to Ira Outhouse and Mrs. Adams, respectively, upon the occasion of the settlement and distribution of the estate of William Outhouse, were properly allowed.



There was evidence to warrant the findings of fact as to these claims, and this court cannot review the evidence. The legal questions involved in these findings, and the objections to the plaintiff's right to recover thereon, were properly disposed of by the Supreme Court, and the reasons assigned by Judge JOHNSON for an affirmance of the judgment of the referee in respect of that portion of the recovery are entirely satisfactory; so, too, the exception to the admission of evidence is well answered in the opinion of the court below. But the referee and the Supreme Court erred in giving the plaintiff judgment upon the promise to Ira Outhouse and Mrs. Adams.

They, with the defendant and other children and next of kin, each entitled to a distributive share of the estate of William Outhouse, had met with the representatives of the deceased, for the purpose of an amicable settlement and distribution of the property among those entitled. Ira Outhouse and Mrs. Adams, severally and without the knowledge of the others equally entitled, charged the defendant with the appropriation of a large amount of personal property which should come into the distribution as a part of the estate of the decedent, and threatened a prosecution, refusing to consent to any settlement and distribution until such claim was arranged. To appease and satisfy these persons, and induce them to acquiesce in the settlement and distribution of the estate, the promises were made, and the promisees, with the other children and next of kin of the intestate, made a settlement and agreed upon a distribution of the property and estate, which was carried into effect.

It is evident that the distributees of the estate, other than those taking part in this arrangement, supposed that all were sharing equally in the estate of the intestate, and the settlement and distribution were made and assented to upon the faith of this equality. If any one had refused to come into the arrangement for any reason, it could not have been accomplished. The result, if the promises of the defendant were valid, will be to give to each of the promisees a larger share

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Opinion of the Court, per ALLEN, J.

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and portion of the estate than the others received. The promisees and their assignee, the plaintiff, are estopped from alleging that there was no foundation for the claim they made, and that no part of their ancestor's estate had been appropriated by the defendant, or was omitted from the property then ready for distribution and actually distributed. All present and taking part in the settlement, and receiving a part of the estate, were entitled to share in every part and in the whole of it. No one had a right, or could, in good faith, by any secret arrangement with another, secure to himself any advantage over the others. As each became a party to, and acquiesced in the distribution, he did so upon the faith that he was sharing equally with every other; and any secret agreement or arrangement, which should disturb this equality, was a fraud and a violation of the good faith which each owed to the other, and the confidence which each had a right to repose in the other. They occupied that relation of trust and confidence to each other which called for the exercise of good faith in all, and prohibited each from securing any special advantage to himself. Ira Outhouse and Mrs. Adams, in accepting their share of the estate distributed by the representatives, and becoming parties to the settlement, held out to the others, and induced them to believe, that they accepted the same as their just and full portion of the estate; and the others may be presumed to have been influenced by such action to assent to the settlement. These promises are within the principle which avoids all promises and agreements by which one creditor, uniting in a composition deed, seeks to secure an advantage over the other creditors agreeing to the compromise. Such arrangements and agreements, whatever their form, are uniformly condemned; and no action will lie for the recovery of a debt secretly reserved from the composition, or upon a promise made in consideration of signing the deed. (*Russell v. Rogers*, 10 Wend., 473; *Lawrence v. Clark*, 36 N. Y., 128.) The principle was reaffirmed and applied by this court in *Bliss v. Matteson*, recently decided (*ante*, p. 22), under somewhat peculiar circumstances, which need not be repeated. The case is

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Statement of case.

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authority for holding that the principles of *Russell v. Rogers*, and kindred cases, apply to all cases within the reason of the rule, and absolutely disables every one, acting with others in a matter of common interest, from securing to himself any particular profit or advantage over his associates, by any secret or undisclosed agreement or understanding.

The referee should, at the close of the plaintiff's evidence, on the motion of the defendant then made, and upon the evidence as it then stood, clearly disclosing the transaction, and showing the illegality of the promises to Ira Outhouse and Mrs. Adams, have dismissed the complaint as to the causes of action based upon these promises, and set forth in the second and third counts of the complaint.

The judgment must be reversed, and a new trial granted; costs to abide event.

All concurring,

Judgment reversed.

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GOEHAM F. BAKER et al., Respondent, v. CHARLES W. REMINGTON, Appellant.

The Supreme Court have no jurisdiction to review, on appeal, an order granting a new trial, made by the city court of Brooklyn, in an action brought therein.

By the true construction of the act of 1850 (Laws of 1850, chap. 102), an appeal to the Supreme Court at General Term, from that court, can be taken only from a final judgment, upon which appeal an intermediate order necessarily affecting the judgment can be reviewed.

The jurisdiction was not enlarged by the subsequent amendment of section 344 of the Code made in 1860 authorizing appeals, from orders made by a county court or county judge.

Accordingly,—*Held*, that a reversal by the General Term of the Supreme Court of an order of the city court of Brooklyn, granting a new trial on, the ground of newly discovered evidence, must, on appeal to this court, be reversed for want of jurisdiction.

The city court of Brooklyn, as a court of civil jurisdiction, is a court of record with jurisdiction unlimited, in amount, and possesses all the powers

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Statement of case.

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and authority in relation to actions therein, possessed by the Supreme Court as to actions there brought.

(Argued March 21st; decided April 4th, 1871.)

THIS is an appeal from an order of the General Term of the Supreme Court in the second judicial district, reversing an order of the city court of Brooklyn vacating and setting aside a judgment in this action, in favor of the plaintiffs, on the ground of fraud, in that the same was procured by false testimony as to a material issue on the part of the plaintiffs, and on the ground of excusable surprise; and for a new trial on the ground of newly discovered evidence upon a material issue.

*Samuel Hand* (*Samuel A. Noyes* with him), for appellant.

*Amasa J. Parker*, for the respondents. The remedy of the defendant is by action, and not by motion. (*Farrington v. Bullard*, 40 Barb., 512.) The courts will, perhaps, stay the execution of a judgment obtained in this way, but such an order would only be granted in an action in equity for relief; such has been, and is now the practice. (*Peck v. Hiller*, 30 Barb., 655; *Sheldon v. Stryker*, 42 id., 287; *Case v. Shepherd*, 1 Johns. Cas., 245; *Jackson v. Chase*, 15 Johns., 354; *Hastings v. McKinley*, 3 Code R., 10; *Jackson v. Fassett*, 9 Abb., 137.) The City Court of Brooklyn is an inferior court, and of limited jurisdiction. (*Simmons v. De Barre*, 8 Abb., 269; Const., art. 6, §§3, 14.) The Supreme Court, only, has general jurisdiction. (Laws, 1849, 170, §2; id., 1850, 148.) It has been doubted, even, whether the Supreme Court has a right to hear and determine a motion granting a new trial, after judgment has been entered on the verdict. (*Stilwell v. Staples*, 4 Robt., 639; *Folger v. Fitzhugh*, 41 N. Y., 231; *Gurney v. Smithson*, 7 Bosw., 400.) It was a matter of discretion; and an order granting or denying a motion to set aside a judgment is not appealable to this court. (*Sherman v. Felt*, 2 Comst., 186; *Dunlap v. Edwards*, 3 id., 341; *Kurz v. Merchants' Co.*, 1 Seld., 547; *Wakeman v. Price*, 3 Comst.,

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334.) It is not a substantial right. (*Footte v. Lathrop*, 41 N. Y., 358; *Morgan v. Skidmore*, Ct. App., 1871.) As to setting aside the verdict, on the ground of newly-discovered evidence, see *People v. Superior Court* (10 Wend., 285); *Shumway v. Fowler* (4 Johns., 425); *Duryea v. Denison* (5 id., 248); *Graham & Waterman on New Trials*, vol. 3, pp. 1030, 1035; *Tripler v. Eberhart* (5 Robt., 609). No reasonable diligence was exercised. (*Levy v. Roberts*, 8 Abb., 310; *Floyd v. Jayne*, 6 Johns. Ch., 482.) The new evidence was impeaching. (*Brown v. Hoyt*, 3 Johns., 255; *Harrington v. Bigelow*, 2 Denio, 109. *Beach v. Tooker*, 10 How., 297; *Meakin v. Anderson*, 11 Barb., 215.) The new evidence is strictly cumulative. (*Levy v. Roberts*, 8 Abb., 310; *Brisbane v. Adams*, 1 Sandf., 195; *Adams v. Bush*, 23 How., 262.)

ALLEN, J. Whether the order of the city court was properly reversed upon the merits need not be considered, if I am right in my views of the jurisdiction of the Supreme Court. The city court of Brooklyn as a court of civil jurisdiction is a court of record, with jurisdiction unlimited in amount. It possesses all the powers and authority in relation to actions, and the process and proceedings therein, as are possessed by the Supreme Court, and the practice of the Supreme Court is made applicable to and binding upon it. (Chap. 125 of Laws of 1849.) Appeals may be taken from any judgment or final determination of that court, and from any intermediate order involving the merits, and necessarily affecting the judgment, to the Supreme Court, and all the provisions of law relative to appeals, from courts of inferior jurisdiction to the Supreme Court, apply to appeals from that court. (Chap. 102 of Laws of 1850, § 1.) At the time of the passage of this act no appeal was given to the Supreme Court from orders made by an inferior court, and the effect of the reference to the statutes relating to such appeals, was to adopt and apply to appeals from judgments in the city court of Brooklyn, the provisions of law as to the mode and manner

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of perfecting an appeal, and the giving security and prescribing the effect of the appeal.

The act of 1850, gave the appeal and declared the cases in which it might be brought. The appeal given was from a judgment with the power incidentally to review any intermediate order involving the merits, and necessarily affecting the judgment. No appeal from an order was given, except in connection with an appeal from a judgment. This right of appeal has not been enlarged by any subsequent statute. The Code was amended in 1860 by adding a clause to section 344, which gave an appeal from judgments rendered by a County Court, or by the mayor's courts or the recorder's courts of cities, by authorizing appeals from an order affecting a substantial right made by a County Court or a county judge. Orders made by mayor's or recorder's courts, or by the city court of Brooklyn, are not the subject of an appeal under this amendment. They are carefully excluded by the terms of the act.

The evident intent of the act of 1850 was to give an appeal from final judgments, and a review upon such appeal of intermediate orders involving the merits and affecting the judgment in analogy to the provision authorizing appeals to this court from final judgments of other Courts. (Code, § 11.)

The Supreme Court had no jurisdiction to entertain this appeal. There was no judgment from which an appeal could have been taken, and it follows that there was no appeal from a judgment, and an intermediate order affecting the judgment, within the terms of the statute. The several chapters of the Code regulating appeals prescribe the cases in which, and the orders and judgments from which, appeals may be taken; and while appeals from orders are allowed from the Special Terms to the General Terms of the same court, and in certain cases from the Supreme and other courts to this court, no such appeals are given to the Supreme Court from inferior courts, except from a specified class of orders made by a county court or a county judge. The order of the Supreme Court reversing the order of the City Court of Brooklyn must

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be reversed, and the order of the latter court affirmed, for the reason stated. If the merits were before us for review, we should incline to the same result regarding the granting of a new trial, for the cause alleged, under all the circumstances, a just exercise of the power vested in the City Court.

The Supreme Court has given the statute a different construction, and entertained appeals from orders of a like character made before the entry of a judgment, upon the ground the words, "necessarily affecting the judgment," might fairly be construed as applying as well to a judgment to be rendered as to one already entered. We think we have given the statute the interpretation and effect which the plain and obvious meaning of the language demand, and that if it is defective, the remedy is with the legislature. *Thurber v. Townsend* (22 N. Y., 517), is in point to sustain these views.

The order should be reversed, and that of the City Court affirmed, with costs.

All concur.

Order reversed.

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ROGER D. WELLS, as executor, Appellant, v. LYSANDER MANN, Respondent.

It is the right of a surety to pay the debt and sue his principal, and one who, for value, transfers a debt or security, and becomes guarantor or indorser thereupon, can thus protect himself against the consequences of delay in enforcing the principal obligation. He cannot, by notice, impose upon the creditor or holder, the duty of active diligence, at the risk of discharging the surety by omitting it.

The defendant, holding a note made by V., transferred it, at the time signing his own name under that of V. The note subsequently coming into the hands of the plaintiff, he transferred it to C, writing his own name under the defendant's, with the word "surety" added. This transfer was upon a loan of money by C. C. subsequently sued the plaintiff to recover the amount, setting up both the loan and the note. The defendant thereupon requested the plaintiff to defend on the ground of his (the defendant's) notice to C. to collect the note of V. and the latter's neglect to do so, promising to indemnify him as to the costs of such defence. The

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plaintiff defended unsuccessfully. In the present action brought by him to recover the costs of such defence,—*Held*, that although such notice to and neglect of C. was no defence to the plaintiff, and although a judgment on that issue in the plaintiff's favor would have been no bar to an action against the defendant, yet the promise to indemnify was valid, as founded upon a good consideration, in the loss and trouble to the plaintiff of the defence.

(Argued March 30; decided April 11th, 1871.)

APPEAL from the late General Term of the Supreme Court. in the Third judicial district.

The action was first tried without a jury, in October, 1862; judgment went for the plaintiff for the full amount. Defendant appealed to the General Term of the third district, where the judgment was reversed. The cause was again tried at the Schoharie circuit, before a jury. The jury were directed to find for the defendant on the first cause of action in the complaint (the one now in question), and it was ordered that proceedings be stayed until the determination of the court upon the exceptions taken, and that they be heard at the first instance at the General Term. The General Term denied plaintiff's motion for a new trial, and ordered judgment in accordance with the verdict. The plaintiff appealed to this court.

The plaintiff claims to recover the amount paid by him for damages and costs incurred by him in defending an action brought against him to recover the amount of a note, and alleges that he paid the same as surety for the defendant. He also claims that the costs of defending were incurred at the defendant's request and for his benefit. Mann, the defendant, was the owner of a note made by Vrooman for \$300; he transferred it to one Chase, himself signing under Vrooman's signature. Chase transferred the note to Wells, the plaintiff; he afterward sold the note to Cameron, upon a loan of money and at the time, signed his name under Vrooman's and the defendants, adding the word "surety;" but of this transaction the defendant had no knowledge. Cameron afterward sold his demand against Wells for the money loaned, and also this note, to Watson. He commenced an



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action against Wells upon the note and the demand for the money loaned under such circumstances and recovered.

The defendant offered to show, that while Cameron was the owner of the note, the defendant had notified him to proceed and collect the note of Vrooman, who was then solvent, but that he neglected to do so. Vrooman is now insolvent. The offer, under objection, was rejected. Soon after Watson had sued the plaintiff, the defendant met him and informed him of the notice to Cameron. After such information Wells said to Mann, if you say so, I will pay the note and save costs; if not, and you think best, I will defend. Mann said he did not wish to pay the note if he could avoid it. Wells claims that Mann distinctly told him to defend. Mann denies that he did so. This action is brought upon Mann's promise to indemnify.

*N. C. Moak*, for appellant. If Wells signed the note after its execution by Vrooman and defendant, he was merely a guarantor (27 N. Y., 41), and Watson could not recover upon the note the amount thereof, but only the amount paid Wells for his signature. (31 Barb, 241; 29 N. Y., 410.) Mann would have been benefited by the defence had it been successful. (*Fake v. Smith*, 7 Abb. N. S., 106; 12 N. Y., 343; 10 Wend., 203, 205; 2 Hill, 105; 3 Watts, 311; 3 Watts & Serg., 409; 4 Mass., 349; 20 N. Y., 227; 12 Wend., 309; 26 N. Y., 129; 15 N. Y., 407; 15 Wend., 425; 40 Barb., 235; 31 Barb., 540; 44 Barb., 327; 38 Barb., 126; 6 Barb., 466.) As to a discharge of the surety and waiver of the laches, see 4 Hill, 650; 45 Barb., 216, 217; *Edw. on Prom. Notes*, 650, 651; *Tibbets v. Dowd* (23 Wend., 381); 1 Par. on Con., 5 ed., 171; 3 Kent's Com., 113, marg. p.; *Sigerson v. Matthews* (20 How. U. S., 496, 500).

*L. Tremain*, for respondent, on the question of suretyship, cited *Harris v. Warner* (13 Wend., 400); *Warner v. Price* (3 Wend., 397); *Zaker v. Martin* (3 Barb., 634); *Sisson v. Barrett* (2 Comst., 406); *Partridge v. Colby* (19 Barb., 348); *Butler v. Haight* (8 Wend., 535); *Monroe v. Hoff* (5 Denio,

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360); *Hunt v. Amidon* (4 Hill, 349); *Norton v. Coons* (3 Denio, 132); *Lathram v. Wilson* (30 Vt. (1 Shaw.), 604); Fell's Law of Guar. and Suretyship, 2d Am. ed., 268; *Chappell v. Spencer* (23 Barb., 584).

ANDREWS, J. It was held in *Paine v. Packard* (13 J., 174), in an action by the payee against the makers of a joint note, which was signed by the defendant Packard as surety for his co-contractor, that a surety is discharged from liability by the neglect of the creditor to proceed to collect the debt of the principal debtor upon the request of the surety where by reason of such neglect and the subsequent insolvency of the principal the debt as to him is lost.

This case was regarded as introducing a new rule, and while the rule has been adhered to in cases strictly analogous, the courts have been disinclined to extend it. (*Tremble v. Thorn*, 16 J., 151; *King v. Baldwin*, 17 J., 384; *Herrick v. Borst*, 4 Hill, 650; *Pitts v. Congdon*, 2 Comst., 352.)

In *Tremble v. Thorn* the court refused to apply it in an action by the holder of a promissory note against an indorser, who had indorsed and transferred it for value, on the ground that although an indorser is in the nature of a surety, he is answerable upon an independent contract.

Nor has it been extended to engagements which, though collateral in form, were entered into for the benefit of the surety, subsequent to the original transaction, and upon a new or independent consideration.

The argument from natural equity and the presumed intention of the parties, upon which the doctrine in *Paine v. Packard* is sustained, has but slight application in such cases. It is the right of a surety to pay the debt and prosecute the principal, and one who for value transfers a debt or security, and thereupon becomes guarantor or indorser, can protect himself against the consequence of delay in enforcing the principal obligation, and cannot, we think, by notice impose upon the creditor or holder the duty of active diligence at the risk of discharging the surety by omitting it.

[Paine v. Packard]

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The defendant in this case took the note from Vrooman in payment of a debt and then transferred it in part payment for a farm purchased by him, and at the time of the transfer signed it.

It is unnecessary to determine the nature of his obligation. Whether he is regarded as a maker or guarantor (27 N. Y., 39; 29 id., 408), he was not a surety within the rule in *Paine v. Packard*, and the omission of the holder to prosecute Vrooman, upon his request, although Vrooman subsequently became insolvent, did not discharge him from liability.

If, therefore, the defendant requested Wells to defend the suit of Watson upon the ground that Cameron had neglected to prosecute Vrooman and promised to pay the costs of that defence, such promise was not supported by any consideration beneficial to the defendant.

But the consideration of a promise may be found as well in any loss, trouble or inconvenience to, or charge upon the person to whom it is made, as in a benefit to the person making it. (Smith's Law of Cont., 52; 1 Sel. N. P., 43.)

And if Wells defended the suit of Watson upon Mann's promise to indemnify him against the costs of the defence, and the defence was made in good faith, it was a good consideration for the promise, although Mann was mistaken as to the validity of the defence.

The court directed a verdict for the defendant, and this direction was erroneous, if upon the most favorable consideration of the evidence the jury could have found that the suit of Watson was defended at the request of Mann and upon his promise to pay the costs.

There is no proof of an express promise, but an agreement may result as a legal inference from the facts and circumstances of the case, although not formally stated in words. (Story on Cont., § 11.)

It was assumed in the conversation between Mann and Wells in respect to the defence of the Watson suit, not only that the proposed defence, if proved, would exonerate Wells

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from liability, but that a judgment upon the issue in his favor would be a bar to a subsequent action against Mann.

This assumption in both respects was unfounded, but it is a material circumstance, in interpreting the language of the parties, that they acted upon it.

When the Watson suit was commenced Wells had a remedy against Mann in case he paid the note, unless Mann was discharged by the neglect of Cameron.

Wells testified that he informed Mann that he should pay the note and save costs, unless the latter thought best to defend the suit, and that Mann after some hesitation directed him to "go on and defend it."

The defence was then interposed, and the plaintiff recovered a judgment for damages and costs.

Upon this evidence, in connection with the other circumstances, the jury might have found a promise by Mann to pay the costs of the defence, and the case should have been left to them upon that issue.

It is not material to the rights of the parties whether the recovery in the suit of Watson was upon the loan or upon the note held as collateral security for it. The complaint in that suit was framed so as to have allowed a recovery for either cause of action.

If the recovery was for the loan, it negatives any claim that the defence to the note prevailed. Any act or omission of duty on the part of Cameron, whereby the security of the note was lost, was a good defence in an action to recover the money loaned to the extent at least of the value of the security. (Story's Eq. Jur., § 326; Story on Notes, § 284; *Schroepfel v. Shaw*, 3 Comst., 446.)

The judgment should be reversed and new trial granted, with costs to abide the event.

All agree. Judgment reversed. New trial granted.

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Statement of case.

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THOMAS STARIN, Plaintiff in error, v. THE PEOPLE, Defendants in error.

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The prisoner was indicted, as accessory before the fact, to burglary in the first degree, charged to have been committed by several principals, at the time of the prisoner's trial; only one of whom had been convicted.—*Held*, that in such a case, the accessory must be tried and convicted as accessory to the convicted principal only; in the same manner as if the convicted principal only was named in the indictment.

If the court, in a criminal case, entertains and decides a material legal question, fundamental in its character, the decision of which is excepted to before impanneling the jury, and the parties act upon it, such decision should be deemed incorporated into the proceedings on the trial; or, in other words, a part of the trial itself. In such a case, where an objection is taken at the time, it is unnecessary to renew the objection afterward.

(Re-argued March 23d; decided April 11th, 1871.)

APPEAL from the judgment of the late General Term of the Supreme Court, in the fourth judicial district, affirming a conviction at the Montgomery Oyer and Terminer.

Starin and Fonda were indicted in Montgomery county, in May, 1866, as accessories before the fact, to burglary in the first degree, and larceny, committed by Disbrow, and John, Charles and William Van Voast, as principals. Disbrow pleaded guilty, and was sentenced to ten years imprisonment; Fonda was tried and convicted, sentenced for ten years, and after serving two years, was pardoned; William Van Voast turned State's evidence, and has not been tried; Charles and John Van Voast are fugitives from justice; Starin was tried and convicted in May, 1867. A bill of exceptions was made in his behalf, and the case was reviewed in the Supreme Court, on certiorari, where the conviction was affirmed and the cause remitted to the Oyer and Terminer. In October, 1868, Starin was sentenced in the Oyer and Terminer, and the cause was then taken to the Supreme Court, by writ of error, where the judgment of the Oyer and Terminer was affirmed.

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The cause was then brought into this court, by writ of error, where it has been since January, 1869. It was argued in this court in March, 1869, and, after being held over two terms, the court, in December, 1869, ordered a re-argument.

*D. S. Morrel*, for the people. Where several persons unite in the commission of a crime, some of whom are principals and others accessories, it is the most usual way to indict and try them together. (Wharton's Crim. Law, § 138; Russell on Crimes, 384; 1 Chitty Crim. Law., 421.) Starin could be tried as soon as one of his principals was convicted. (1 Chitty Crim. Law, 421; Russell on Crimes, 38; Wharton's Crim. Law, 136; Barb. Crim Law, 287; *Com. v. Knapp*, 10 Pick., 247; *People v. Baron*, 1 Park., 246.) A point must be raised in a criminal case in the same manner as in a civil one. (*Dore v. People*, 5 Park., 390; *Stafford v. People*, 1 Park., 474; *People v. Stockenham*, 1 Park., 424.) Whatever meaning is given to the words of the statute will be given to them in a pleading founded upon it. (*Mason v. People*, 26 N. Y., 200; *Cole v. Jessup*, 10 N. Y., 103, 104.) "Burglariously did break" implies a forcible breaking. (Arch. Crim. Plea, 268, and note.) Unlatching a door which is latched is sufficient breaking to constitute burglary. (Wharton's Crim. Law, §§ 15, 38.) William Van Voast was properly allowed to be sworn as a witness for the prosecution. (*People v. Wison*, 5 Park., 119; *People v. Whipple*, 9 Cow., 709.) If the Appellate Court is satisfied that the party could not have been injured by the admission of evidence, technically inadmissible, it is not bound to grant a new trial. (*People v. Gonzales*, 35 N. Y., 59, 60; *Forrest v. Forrest*, 25 N. Y., 501; *Shorter v. People*, 2 N. Y., 193.)

*W. A. Beach*, for plaintiff in error.

CHURCH, Ch. J. The plaintiff in error was indicted as accessory before the fact to the crime of burglary in the first degree, committed by four principals named in the indict-

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Opinion of the court, per CHURCH, Ch. J.

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ment. At the Montgomery Oyer and Terminer, held on the 13th day of May, 1867 (the prisoner having been arraigned and plead not guilty to the indictment), the district attorney moved the trial of the prisoner, who, by his counsel, objected to proceeding with the trial until after the conviction of all the principals named in the indictment. The district attorney then admitted that but one of the principals had been convicted, that one other was then in jail, and the other two had not been arrested. The objection was then overruled and the decision excepted to.

Several other objections were raised and decided, but one of which it is necessary to notice, and as to that the record is as follows: The prisoner, by his counsel, then objected to being tried as accessory to any other principal than the one who was convicted; the court overruled the objection and the prisoner's counsel then and there duly excepted.

The jury were then impaneled and the trial proceeded. If this exception is available to the prisoner, it is fatal to the conviction and judgment. An accessory may be tried jointly with the principal, but the jury must first agree upon the guilt of the principal, while an acquittal of the principal necessarily acquits the accessory. (Wharton's Crim. Law, § 138.) If the accessory is not tried with the principal, he cannot be tried until the principal has been tried and convicted. (*People v. Bacon*, 1 Park R., 246.) Formerly, if a man was indicted as accessory in the same crime to two or more persons, he could not have been arraigned until all the principals were convicted and attainted. (Hale's Pleas of the Crown, 623, chap. 47.) And in order to try an accessory when only one of several principals had been convicted, it was necessary to indict and arraign him as accessory to that one only. (Id.)

But the modern decisions have somewhat modified this rule, and the weight of authority now is, that an accessory may be tried and convicted when one only of several principals named in the indictment has been convicted. (1 Russell

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on Crimes, 38; Bishop's Crim. Law, § 611; *Commonwealth v. Knapp*, 10 Pick., 477.)

But it is well settled that in such a case the accessory must be tried and convicted as accessory to the convicted principal only in the same manner as though the convicted principal only was named in the indictment. The authorities are uniform on this subject, and I have been unable to find any decision against this position. (*Strops v. Com.*, 7 Serg. and R., 491; 3 Greenl. Ev., § 52; *People v. Bacon*, 1 Park., 246; 1 Bishop's Crim. Law, 468.)

This necessarily results from the rule that the guilt of the principal can only be shown by a judicial trial and conviction, and even then it is not conclusive against the accessory. (10 Pick., *supra*.) The association of unconvicted principals with a convicted principal in the indictment does not authorize the trial of an accessory to any but the one convicted any more than it would if those not convicted had not been named. The decision of the court, therefore, overruling the objection of the prisoner to being tried as accessory to any but the convicted principal, was clearly erroneous.

This objection is attempted to be answered on two grounds, 1st. It is claimed to be ill-timed and not made "upon the trial" of the indictment. Upon the former argument of the case before the late Court of Appeals, the record did not show whether this exception was taken before or after the jury were impaneled, and some of the members of the court regarded that circumstance as controlling in determining whether it could be available to the prisoner in this court. Since the reargument was ordered the record has been amended so as to show that the objection was made just prior to the impanneling of the jury. Ordinarily the trial in civil and criminal cases commences with impanneling the jury, and questions raised before that time are of a preliminary nature or not entertained; but there is no such technical rule on the subject as precludes us from adhering to the substance rather than the form of proceedings in courts, brought here for review.



By the record it appears that the trial of the indictment was moved and the court determined that the trial must proceed. The prisoner's counsel then raised various questions, and among others the one under consideration. The court entertained these questions not only, but received evidence by admissions of the district attorney of facts to enable it to pass upon the questions intelligently and appropriately. The point we are now considering was not preliminary in its nature, but one proper to be raised and determined upon the trial; and, although the court might have declined to entertain it at that stage of the proceedings, it was not improper to settle it in advance. It was fundamental in its character, and would necessarily give direction to the whole course of the trial (the evidence to be given and the verdict to be rendered), and we cannot say that it might not influence the composition of the jury itself and the exercise of the right of challenge. The facts admitted by the district attorney were only proper to be proved on the trial, and when received they were as much a part of the evidence on the trial as any other. It is unnecessary to say that in order to avail himself of the exception the prisoner had a strict right to take it at the time he did. It is sufficient that the court entertained the question and passed upon its merits, as upon the trial, and that the parties so regarded it and acted upon it.

It is too late to say that the exception was not taken *upon the trial*. If a court in a civil or criminal case entertains and decides material legal questions which belong to and are properly a part of the trial before impanneling the jury, and the parties act upon them, such decisions should be deemed incorporated into the proceedings on the trial, or in other words a part of the trial itself. Otherwise the greatest injustice might be done to parties relying upon the faith of such exceptions. Life, liberty and property might be unjustly jeopardized by adherence to such narrow technicalities. It was unnecessary to renew the objection afterward.

The parties had a right to rely upon the decision, as the court had made it. The time and manner of raising ques-

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tions and the general conduct of the trial of causes are necessarily, to a considerable extent, within the discretion of the court, and in reviewing judicial proceedings regard should be had to the substance of what has been done rather than the manner of doing it, especially when material, rights and interests are involved. The exception is just as valid and effectual under the circumstances of this case immediately before as if taken immediately after the jury were impaneled, or at any later period of the trial. The other ground for avoiding the force of the objection is that the prisoner was not injured by the decision of the court.

An examination of the case shows that evidence was given and received in accordance with this ruling. One of the unconvicted principals was called as a witness by the prosecution, and testified to his own guilt not only, but also to the complicity of the prisoner with him as a principal disconnected from the convicted principal. An objection, it is true, might have been interposed to this evidence on behalf of the prisoner, but it was not necessary to do so, because it was admissible under the previous decision of the court. One exception is sufficient. A party is not required to raise an objection every time an occasion is presented, after the court has ruled definitely upon the point.

The evidence implicated the prisoner in the transaction, and was therefore injurious to him upon the trial. So as to the charge, although not set forth in the case, it is presumed (if it contained anything upon this point) that it was in accordance with the previous ruling. It is said that the motion made by the prisoner's counsel at the close of the evidence is inconsistent with this presumption. I do not so regard it. That motion was to discharge the prisoner, on the ground that none of the principals had been legally convicted, as the plea of guilty of the convicted principal was not a legal conviction. It sought to take away the fact upon which the original decision was apparently based, that one convicted principal was sufficient to authorize the trial of the

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prisoner as accessory to that one, with others who had not been convicted.

This view of the charge is very much strengthened by the verdict of the jury, which accorded with it and with the original decision of the court. The verdict was that the prisoner was guilty of the offence wherewith he was charged in the indictment. In 7 Serg. & R. (*supra*), the court set aside the judgment in a similar case, for the error of the jury in rendering such a verdict, although no exception was taken. DUNCAN, J., said: "The verdict here finds the prisoner guilty as accessory to all. The jury could not inquire into the guilt of those who had not pleaded, and yet they find them guilty as to these."

We have in this case a distinct decision of the court at the commencement of the trial, in effect, that the prisoner could be tried as accessory to the crime of those who had not been convicted as well as of the one who had; we see that evidence was received which, but for that ruling, would have been incompetent, and that was followed by a corresponding verdict of the jury. It is impossible from this record to arrive at any other conclusion than that the erroneous decision at the commencement pervaded the whole trial and verdict. Casler, a witness for the prosecution, was asked, on cross-examination, the following question: "Did you state before the grand jury, in your testimony, in substance, that the object you had in implicating Starin in the robbery, was that he went back on you for \$1,500 for five men, and you made up your mind that you would lead him along until you had an opportunity to retaliate?" He answered, "I don't know whether I did or not."

The prisoner's counsel afterward called the clerk of the grand jury, who stated that Casler testified before that body that "Starin and him put in five men, and made \$1,500, and it was to be divided, and Starin would not divide it, and he meant to lead Starin along and retaliate on him." The record then states that "the people proposed to read the remainder of Casler's evidence before the grand jury which

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was not read by the prisoner's counsel, *relating to Starin and the Hudson robbery.*" This was objected to by the prisoner's counsel, the objection was overruled and the prisoner's counsel excepted. The witness then stated all the evidence given by Casler before the grand jury, none of which related to the motives which influenced him in implicating the prisoner, but conversations and facts tending to implicate him in the Hudson robbery, and which he had, substantially, before testified to on this trial. The statement of Casler before the grand jury was competent as contradicting evidence, as it tended to show that he was actuated by motives of revenge against the prisoner. (*Atwood v. Wilton*, 7 Conn. R., 66.) The remainder of his evidence before the grand jury did not relate to his motives, or the feelings by which he was actuated, but to the facts bearing upon the prisoner's guilt, and was, therefore, incompetent.

The prosecution were entitled to any statement which would tend to explain or qualify that which had been called out, but were not entitled to statements upon other subjects. (*Rouse v. Whited*, 25 N. Y., 170.) The declaration of ill will against the prisoner was not qualified or explained by the relation of facts and confessions tending to prove the prisoner's guilt. It is urged, however, that the objection was too general, and that the prisoner's counsel should have interposed an objection when it was seen that the evidence was incompetent. The answer to this is, that the question itself implied that the statement related to a different subject from that inquired about. The prisoner's counsel inquired what Casler said about the motives and feelings which actuated him in his action against the prisoner; the prosecution asked for all that Casler stated about Starin in connection with the Hudson robbery. It was not claimed or intimated that he said anything more than had been proven on the subject of his ill will, and the proposition was to call out all of his evidence upon the merits. The evidence received was precisely that called for and no other, and was incompetent. But it is said that the prisoner was not injured by this evi-

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dence. The rule is, that if it can be seen that the prisoner could not have been injured, a new trial will not be granted for the reception of evidence technically inadmissible; on the other hand, if he might have been prejudiced, the admission of improper evidence is error. (30 N. Y., 59.) The witness, Casler, was sought to be impeached in various ways, by showing that he was actuated by revenge, by proving contradictory statements, by evidence of general bad character, and by implicating him in an attempt to commit a similar robbery; and we cannot say that this statement might not have been used to strengthen his credit before the jury, by showing that he had made consistent statements about the transaction at different and distant periods. Such evidence was not proper for the purpose of corroborating the witness, and if it could have been used for that purpose, we cannot say that it was not so used to the prejudice of the prisoner.

The judgment and conviction must be reversed, and a new trial ordered.

ALLEN, GROVER, RAPALLO and ANDREWS, JJ., concur. FOLGER, J., concurred on the last ground, PECKHAM, J., dissented.

Judgment reversed, new trial ordered.

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AUGUSTUS HURD, Appellant, v. ROBERT T. GILL, Respondent.

Where the defendant agreed to allow the plaintiff to dig molding sand upon his, the defendant's, premises, in places to be designated by him, at so much a ton, the digging to commence in spring upon the opening of navigation and end at its close, and the plaintiff dug sand on the defendant's farm at a place designated by him, until the sand at that place was exhausted, and although there were other deposits of sand on the farm, the defendant refused to designate any other place at which it might be dug,—*Held*, that his refusal so to do was a violation of his contract.

(Argued April 14th; decided April 28th, 1871.)

APPEAL from a judgment of the General Term of the Supreme Court of the second judicial district for the defendant, the plaintiff having been nonsuited at the Circuit, and the exceptions having been ordered to be heard in the first instance at the General Term.

This was an action on an alleged breach of contract. By the terms of the contract, the defendant agreed to allow the plaintiff to dig molding sand on his premises in places to be designated by him (the defendant), at the rate of twenty-five cents per ton. It was further stated to be "understood that the digging shall commence in the spring of 1867, upon opening of navigation, and cease at its close." The defendant denied the breach of the contract. On the trial it was shown that the plaintiff had dug sand on the defendant's farm, at a place designated by the defendant, at the opening of navigation in 1867, and continued till the latter part of June, when molding sand at that place was exhausted. There was an abundance of molding sand to be had at other places on the defendant's farm, and the plaintiff called upon the defendant to designate a place for him to dig. The defendant refused to designate any other place. The plaintiff was nonsuited, on the ground that defendant was not obliged to designate more than one place. The exceptions were ordered to be heard in the first instance at the General Term, where judgment was ordered in favor of the defendant.

*Homer A. Nelson*, of counsel for the appellant, insisted that refusal of defendant was a breach of his contract. (*Wescott v. Thompson*, 18 N. Y., 363; *Norton v. Woodruff*, 2 id., 153; *Angevine v. Storm*, 2 Conn., 781; *Hollingworth v. Fry*, 4 Dall., 345; *United States v. Grundy*, 3 Cranch, 337; *United States v. Gurney*, 4 id., 333; *Bradley v. Washington Steam Packet Co.*, 13 Pet., 89; *Slater v. Emerson*, 19 How., 224; *Auburn City Bank v. Leonard*, 4 Barb., 119.)

*A. Anthony*, for the respondent.

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Opinion of the Court, per ANDREWS, J.

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ANDREWS, J. It was assumed by the court on the trial, that the defendant was bound by the contract proved. No question as to the consideration was made. The plaintiff was nonsuited on the ground, that the defendant had performed the contract, when he had designated one place on his farm from which molding sand might be taken by the plaintiff, and that he was not bound to designate another, when the supply at the place first designated became exhausted. It had been shown by the plaintiff that in June, 1867, the supply of sand failed at the place designated, and that although it could have been procured elsewhere on the premises, the defendant refused to designate any other point from which the plaintiff might take it.

The contract is not, we think, subject to the limited construction which was given to it. It does not indicate any intention on the part of the defendant to restrict the taking of sand to a single location. The permission to the plaintiff to dig it, covered the whole time between the opening and close of navigation. He was authorized to dig in "such places" as should be designated by the defendant, implying that several or successive designations might become necessary. The defendant reserved the right to indicate the points from which the sand should be taken, but the right of the plaintiff to sand from the premises was not terminated by the failure of the supply at a given point.

The agreement sued upon does not show upon its face any consideration which will support an action upon it against the defendant.

The plaintiff does not agree to take any sand, nor is there any understanding on his part which furnishes a consideration for the agreement of the defendant. (*The Chicago and North-eastern R. R. Co. v. Dane et al.*, 4 Hand [43 N. Y.], 241.) But a consideration may be shown by extrinsic evidence, and as this point was not raised on the trial, we cannot assume that such consideration did not exist.

The judgment should be reversed and a new trial granted, with costs to abide the event.

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Statement of case.

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All the judges agreeing, judgment reversed and new trial ordered.

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WILLIAM WEED, Respondent, v. DANFORTH N. BARNEY and others, Appellants.

The defendants, a joint stock association, carrying on business as expressmen, and who were also freight agents of the Pacific Mail Steamship Company, received from the plaintiff merchandise in a package marked "C. O. D." to be conveyed from New York to San Francisco, giving him a bill of lading signed by them as agents for the steamship company. At the plaintiff's request, they agreed to deliver the goods to the consignee and to collect the amount due thereon, which amount they were to return to the plaintiff. Subsequently, while the goods were in the defendant's warehouse, and after the consignee had been several times notified to call and take them away, which he had promised to do, they were destroyed by the explosion of a package of nitro-glycerin. In an action brought by the plaintiff to recover the value of the goods,—*Held*, that he was not entitled to recover, and that the liability of the defendant was that of warehousemen only.

(Argued April 10th, 1871; decided April 25th, 1871.)

APPEAL by the defendants from a judgment against them at the General Term of the Court of Common Pleas of the city and county of New York, entered upon a case submitted under section 372 of the Code.

This action was brought to recover of Wells, Fargo & Co., a joint stock association, carrying on business as general agents, expressmen, forwarders and warehousemen, in various parts of the country, compensation for a case of merchandise which was destroyed by the explosion of a package of nitro-glycerin, while both packages were in their warehouse in San Francisco. The nitro-glycerin was artfully concealed, so that the contents of the package were not known to Wells, Fargo & Co.

Wells, Fargo & Co. were agents of the Pacific Mail Steamship Company in New York and San Francisco for



## Statement of case.

receiving freights, freight money, and giving bills of lading for freights. On the 5th of February, 1866, the plaintiff delivered to a clerk of Wells, Fargo & Co., at their office, on the wharf of the Pacific Mail Steamship Company, in New York, the merchandise in question and received therefor a receipt signed by Wells, Fargo & Co., sole freight agents to the Pacific Mail Steamship Company. This receipt was merely evidence of the delivery of the goods at the wharf, to be used in obtaining a bill of lading at the principal office. On the same day this "tag" was delivered up and a bill of lading received, at which time plaintiff requested Wells, Fargo & Co. to collect the price of the goods, with all charges, on their delivery at San Francisco. The bill of lading was headed "Pacific Mail Steamship Co., and Panama R. R. Co.," and signed "Wells, Fargo & Co., sole freight agents for Pacific Mail Steamship Co. and Panama R. R. Co." Wells, Fargo & Co., transmitted the invoice given to them by plaintiff to their San Francisco office, in an envelope, upon the back of which the following among other words were printed: "Do not deliver the whole or any part of the goods accompanying this bill until you receive the pay therefor. Examine the bills inclosed, and follow the special instructions of the shippers, if any are given on the bill. If the goods are refused, or the parties cannot be found notify this office. N. B. Agents must observe the above instructions in every instance." The goods arrived about March 17th, and notice was given to the consignees, and the goods tendered to them and payment demanded. The consignees did not decline to receive the goods but promised to take them and pay the freight charges, and bill within a few days, and the goods remained in the warehouse of Wells, Fargo & Co., until April 16, 1866, when they were utterly destroyed by the explosion of a package of nitro-glycerin.

*Grosvenor P. Lowrey*, for appellants, insisted that defendants were never carriers of plaintiff's goods. (*Kirkpatrick v. Stainer*, 22 Wend., 244; *Mahony v. Kekule*, 14 C. B.,

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Opinion of the Court, per PECKHAM, J.

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390; *Green v. Kopke*, 18 C. B., 549; *Allen v. Bareda*, 7 Bosw., 204; *Rathbon v. Budlong*, 15 Johns., 1; *Lyon v. Williams*, 5 Gray, 557.) If such liability ever existed it terminated when goods were deposited in defendant's warehouse, and consignee had sufficient time to remove them. (*Fisk v. Newton*, 1 Denio, 45; *Gould v. Chapin*, 20 N. Y., 259, 267; *Norway Plains Co. v. Boston*, 1 Gray, 253; *Thomas v. Boston & Providence*, 10 Met., 477; *Young v. Smith*, 3 Dana, 91, 94; *London & N. W. R. Co. v. Bartlett*, 7 M. & W., 400; *Hough v. London & N. W. R. Co.*, L. R., 5 Exch., 51, 58; *Adams v. Darnell*, 31 Indiana, 20; *In re Webb*, 2 Moore, P. C. R., 500; S. C., 8 Taunton, 443; *Northup v. Syracuse R.*, 2 Transcript Appeals, 184; *Storr v. Crowley* 1 McClelland and Youngs, 129, 136.) That they were not required to give notice to consignor. (*Hudson v. Bazendale*, 2 H. & N., 575; *Bremer v. Southern Ex. Co.*, 6 Coldwell, Tenn. R., 361; *Morrison v. Davis*, 20 Penn, 171; *Denny v. N. Y. Cen. R. R.*, 13 Gray, 481; *Arent v. Squires*, 1 Daly, 347.)

*Samuel Hand* of counsel for respondents, insisted that the contract was made with defendants. (*Chicago R. R. Co. v. Merrill*, 48 Ill., 426; *Stone v. Wood*, 7 Cow., 454; 1 Parsons on Cont., 47; *Moss v. Livingston*, 4 N. Y., 209; 18 Com. B., 549; *Malpas v. London Rwy.*, 7 Eng. Law Rep., 1 C. P., 336.) In any event they were liable as common carriers after taking the goods from the ship. (*Gulliver v. Adams Express*, 38 Ill., 503; *Le Centeur v. London Railway*, Law Rep., 1 Q. B., 54; *Sweet v. Barney*, 23 N. Y., 335; *Bulger v. Densmore*, 51 Barb., 69; *McDonald v. Western R. R. Co.*, 34 N. Y., 501-2; 2 Pars. ed. "55," 147; *Tooker v. Parmer*, 2 Hilton, 76; *Hyde v. Trent. Nav. Co.*, 5 T. R., 395; *Am. Ex. Co. v. Lessem*, 39 Ill., 312; *Baldwin v. Express Co.*, 33 id., 197.)

By the Court—PECKHAM, J. Whether Wells, Fargo & Co. were liable, as common carriers or otherwise, for the pack-

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Opinion of the Court, per PECKHAM, J.

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age received at New York for San Francisco, as between those two cities, is not material to this controversy. The defendants received the package at the ship's tackles at San Francisco, and their responsibility, confessed by them, commenced. They were to deliver the package to Finch & Co., at San Francisco, and collect the amount marked thereon, together with charges and commissions.

The package was received by the defendants on the 17th of March, and put in their warehouse, and it was tendered to the consignees and payment demanded. This was repeated several times, until, on the 16th of April, when the package was destroyed, without fault of the defendants.

Let it be remembered, that this package could not have been delivered by the defendants. It was to be delivered only upon payment of the money; and the money was not paid. There was no refusal to receive or to pay. The consignees promised to receive and pay each time, and their delay in doing so was not unusual.

Thus the package remained in the defendants' warehouse until it was destroyed, without their fault.

We have lately held, that a passenger's baggage, arriving at the end of the journey, and not called for until three days thereafter, was then held by the carriers, as warehousemen. (*Burnell v. N. Y. Central R. R. Co.*, ante p. 184; and see *Roth v. Buffalo and State Line R. R.*, 34 N. Y., 548; *Goold v. Chapin*, 20 id., 259; *Northrup v. Railroad*, 2 Trans. App., 183; *In re Webb*, 8 Taunt., 443.)

After the defendants had tendered the package to the consignees and demanded the money, and after the consignees had had a reasonable time to call for and receive it, I think the defendants held the package as warehousemen, and not as common carriers, and were thereafter responsible for the care of warehousemen merely, whatever their attitude before. As warehousemen, it is not pretended they were liable.

But it is insisted that the defendants should have given notice to the consignor, when the consignees did not receive and pay for the package. Was there any contract to do so?

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All there was on that subject was a mere direction from the defendants here to their agents there "to notify this office" "if the goods are refused or the parties cannot be found." This could scarcely be regarded as a contract with the consignor. Nor did either contingency happen. The goods were not "refused;" but the consignees promised to take and pay for them, within the time usual at San Francisco. What was there to notify, so long as these consignees were acting as others usually did at that place, if the practice were reasonable and valid? Neither counsel has questioned the validity of this practice, and I do not propose to pass upon it. The situation and location of the parties must be considered in reference to notice. Mail-time then, between New York and San Francisco, was twenty-two days. The defendants, of course, expected to get pay for the goods before a letter could be answered. Telegraphing was expensive; and there does not seem to have been occasion for its use. There is no statement that it was usually or ever resorted to under such circumstances.

The authorities would not seem to require notice under the facts of this case, though notice may be sometimes necessary.

Expressmen are not required to do unreasonable or absurd things. (*Heugh v. Lond. & N. W. R. Co.*, 5 L. R. [Exch.], 51; *The Lond. & N. W. R. Co. v. Bartlett*, 7 Hur. & Nor., 400; *Kremer v. South. Ex. Co.*, 6 Cold., 356; *Gulliver v. Adams Ex. Co.*, 38 Ill., 503.)

In the case at bar, what had the expressmen to communicate if they had given notice? Nothing unusual, as nothing unusual had occurred. But suppose they had notified the home office of the whole facts, and they had directly come to the knowledge of the consignor? He had thus become aware that some days had elapsed and the money had not been paid, but had been promised, and no doubt would be paid in a few days, as was usual at that place. Would the consignor have given any directions at war with the course pursued by defendants? In all probability he would not. But if he had given directions by mail to return the goods forthwith to

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New York, the order would have arrived too late; it would not have prevented the loss.

Thus it was not the lack of giving notice that caused the loss, hence defendants are not liable for omitting to give it. (*Morrison v. Davis*, 20 Penn., 171; *Denny v. N. Y. Cent. R. R. Co.*, 13 Gray., 481.)

The judgment is reversed and judgment ordered for defendants.

All the judges agreeing, except FOLGER and RAPALLO, J. J., who did not vote.

Judgment reversed, and judgment ordered for defendants, with costs.

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JOHN R. ELWOOD, Appellant, v. GEORGE S. GARDNER,  
Respondent.

Under the Code, an order of arrest may be obtained in two classes of cases: in those where the cause of action is identical with the cause of arrest, and in those where facts *dehors* the cause of action constitute the cause of arrest. In the latter class of cases, unless an order of arrest is obtained before judgment, no *ca. sa.* can issue; but if such order of arrest be obtained, and the defendant omits to move to set it aside, or fails in a motion so to do, he is concluded, after judgment, from questioning the right to an execution against his person.

In the former class, the defendant may contest the right to arrest upon a preliminary motion to set aside the order, or contest the alleged cause of action upon the trial itself, if at the trial the plaintiff is permitted to abandon his cause of action as alleged.

In an action brought by the plaintiff to recover damages sustained by him in consequence of the false and fraudulent representations of the defendant, his indorser as to the solvency of a maker by which he was induced to accept a note with defendant's indorsement, an order of arrest was obtained upon an affidavit setting forth the same facts as the complaint. At the trial the plaintiff, having abandoned his action for the fraud, and taken judgment against the defendant as indorser, merely issued execution against the person.—*Held*, that the defendant had a right, though falling, to set aside the order of arrest before judg-

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ment, to have vacated the execution issued against the person of the defendant.

(Argued April 11th, and decided April 25th, 1871.)

APPEAL from an order of the General Term of the Supreme Court in the second judicial district, affirming an order at the Special Term, vacating an execution issued against the person of the defendant.

The plaintiff brought suit by a summons for relief, the complaint being in the form of an action for damages sustained by reason of alleged false representations made by the defendant to the plaintiff, as to the solvency of the maker of a promissory note, through which he was induced to take the note, the making of which by a third party, and the indorsement of the same by the defendant to the plaintiff were set out in the complaint. The defendant was arrested, on an order of arrest obtained upon an affidavit, identical in substance with the complaint. The defendant made no effort to set aside the order, but appeared on the trial, and asked that the question involving his liability to arrest be there contested. This the court denied, holding that such allegations were surplusage, and that the plaintiff was entitled to judgment, on proof alone of the defendant's liability on the note described in the complaint, and, on such proof being given, ordered judgment accordingly.

The defendant appealed to the General Term, where the judgment was affirmed. Executions were duly issued, first against the property, and subsequently against the person, of the defendant, and the defendant then moved, on affidavit, to set the latter aside on grounds and reasons no other than those existing at the time of the arrest. The plaintiff declined to introduce counter affidavits, and the court vacated the executions upon the proofs as presented by the defendant's papers. The plaintiff appealed to the General Term, where the order was affirmed; whereupon the plaintiff appealed to this court.

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Opinion of the court, per CHURCH, Ch. J.

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*John B. Elwood*, for the appellant, in person, insisted that motion should have been made before judgment. (Code, §§ 183, 204; *Barker v. Wheeler*, 23 How., 193; *Roberts v. Carter*, 17 id., 479; *S. C.*, 9 Abb., 106; *Lozee v. Carpenter*, 3 Abb., N. S., 309; *Atocin v. Garcia*, 24 How., 186; *Wood v. Henry*, 40 N. Y., 126-129; *Smith v. Knapp*, 30 id., 589; *Carrin v. Freeland*, 6 id., 560-564.)

*Edwin G. Davis*, for the respondent, insisted that Supreme Court had power to vacate the execution in this case. (*Pope v. Newcomb*, cited, 30 N. Y., 589; *Smith v. Knapp*, 30 N. Y., 581; 7 Hill, 182; *Humphrey v. Brown*, 17 How. Pr., 481.)

CHURCH, Ch. J. This court, in *Smith v. Knapp* (30 N. Y., 581), held that, if a motion to set aside an order of arrest is not made before judgment, the defendant may be imprisoned on a *ca. sa.*, issued on the judgment. But, if the judgment is recovered for a cause of action for which the defendant is not liable to arrest, he may then move to set aside the *ca. sa.*, or be discharged from imprisonment. In that case, there were several causes of action set forth in the complaint, in some of which the defendant was liable to arrest, and in others not. An order of arrest had been obtained in the former, and judgment was taken for a cause of action for which the defendant was not liable to arrest. In such a case, it is manifest that the court should relieve a party from imprisonment; otherwise he might be imprisoned for a cause not authorized by law, through the form of procedure.

Section 179 authorizes the arrest of a defendant in certain actions specified in the act, of a tortious character, and also in actions on contract, when the defendant has been guilty of certain wrongful acts affecting the cause of action or the consideration. Subdivision four reads as follows: "When the defendant has been guilty of a fraud in contracting the debt, or incurring the obligation, for which the action is brought, or in concealing or disposing of the property for the taking, detention or conversion of which the action is brought, or

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when *the action is brought to recover damages for fraud or deceit.*" Section 288 declares that "no execution shall issue against the person of a judgment debtor, unless an order of arrest has been served as in this act provided, or unless the complaint contains a statement of facts showing one or more of the causes of arrest required by section 179."

An order of arrest may be obtained in both classes of cases; in those cases where the cause of action is identical with the cause of arrest, and in the actions where facts *dehors* the cause of action constitute the ground of arrest. In the latter class of cases, unless an order of arrest is obtained before judgment, no *ca. sa.* can issue.

This process is, in effect, prohibited by section 288, above quoted. In such cases, it is not necessary or proper to set forth the facts constituting the cause of arrest in the complaint, because they constitute no part of the cause of action, and are not relevant to it, and need not be proved on the trial. For instance, in an action upon contract to recover a debt, it would be improper to set forth that the defendant had been guilty of fraud in contracting the debt, or that he had disposed of his property with intent to defraud his creditors. It is only proper to state in a complaint the facts necessary to the cause of action. In such a case an order of arrest must be obtained before judgment to entitle the plaintiff to a *ca. sa.* If obtained, and not set aside before judgment, a *ca. sa.* may issue without any further order or direction of the court, and the defendant, if he seeks to avoid the effect of the order, can move to set it aside at any time before judgment; and if he omits to do so, or if he is unsuccessful in a motion to set it aside, he is concluded, after judgment, from questioning the binding effect of the order. But when the action is one which gives the plaintiff a right to an order of arrest, and the facts constituting it are identical with the facts constituting the cause of arrest, the defendant can contest the right to arrest upon a preliminary motion to set aside the order, and also contest the alleged cause of action, of course, upon the trial. In such a case it follows



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that he is not concluded by the order or the decision upon the motion to set it aside, and he may omit to make the motion altogether, as the trial upon the alleged facts in the complaint will furnish an opportunity to contest the facts in a form preferable to that upon motion. If the trial of such an action results in favor of the plaintiff, the record is conclusive in favor of the right to issue a *ca. sa.*, and, if for the defendant, the order is of course discharged.

The meaning of the latter clause of section 288, providing that a defendant shall not be arrested unless the complaint contains a statement of facts showing one or more causes of arrest, required by section 179, is that the statement in the complaint must be of facts legitimately and properly in the complaint, such as are proper and necessary to be proved; or, in other words, such as constitute a cause of action for which a party may be arrested. It would be absurd, in an action on a promissory note, to allow a party, after judgment, to issue a *ca. sa.*, without having obtained an order of arrest, merely by incorporating into the complaint a statement of facts sufficient to have authorized the order upon a motion. Such facts have no legitimate place in a complaint, unless they are pertinent to the cause of action; and, if they are, they should be proved on the trial.

This was an action to recover damages for fraud and deceit, in obtaining money by false and fraudulent representations as to the pecuniary standing and credit of the makers of a note, and the pecuniary ability of the defendant, who indorsed and transferred it to the plaintiff. The complaint sets forth the representations, their falsity, that the party relied upon them, and then says, "that by reason of the false and fraudulent conduct, acts and representations on the part of the said defendant, the said plaintiff has sustained damages" to the amount of the note and interest, and fifty dollars costs, incurred in prosecuting the makers, and demands judgment therefor. It is true that facts in relation to the making, indorsement and transfer of the note are set out, but these are stated by way of inducement, and for the purpose of showing

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the occasion and materiality of the representations. (*Townsend v. Hendricks*, 40 How., 143.)

There is no claim to recover upon the note, or against the defendant as indorser. On the contrary, it is claimed to recover fifty dollars more than the plaintiff would be entitled to against the defendant as indorser, and expressly for fraud. All the allegations of fraud in the complaint were improper, unless they constituted a cause of action for fraud and deceit. Besides, the summons was for relief, showing that the plaintiff intended not to commence an action upon the note; and the complaint shows conclusively that he carried out that intention. This was a case, therefore, where the defendant had a right to omit making a motion to set aside the order of arrest, and contest the facts upon the trial. He had every legal reason for regarding this as an action founded upon tort, which the plaintiff was bound to prove, and which he could contest upon the trial. It seems that at the trial the plaintiff abandoned his action for fraud, and the court allowed him to take judgment against the defendant as indorser of the note.

It is unnecessary to determine whether this was error or not as that question is not before us, but if it was not (and the plaintiff cannot question its correctness upon this motion), it must have been upon the ground that the complaint contained two causes of action; one upon contract, and the other for fraud; or that, under the liberal policy inaugurated by the Code, the plaintiff was entitled to winnow out from the complaint the facts stated by way of inducement, and reconstruct them into an action on contract, and recover thereon.

The case presented is this. The plaintiff commenced an action to recover damages for fraud and deceit, and procured an order of arrest, upon the identical facts constituting the cause of action, as set forth in the complaint. The defendant omitted to move to set aside the order of arrest, relying upon his procuring a discharge therefrom by defending the action and contesting the facts upon the trial. At the trial, the plaintiff abandoned his cause of action, and procured a

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judgment upon contract, in an action for which the defendant was not liable to be arrested, except upon extrinsic facts to be proved by affidavit, and now claims that the defendant is concluded by the order of arrest in the same manner as though the action had been brought on the contract, and the order of arrest had been procured upon outside facts stated in an affidavit. This practice is too sharp, and whether intended or not, we can see that it might have operated as a fraud upon the defendant. If the action had been upon the note, as the recovery was, the defendant would have known that he could only contest the right to the order upon a motion to set it aside, but he had legal reasons for believing that he could do it at the trial. He was deprived of the right by the action of the plaintiff. The consequence may be to enable the plaintiff to imprison his debtor contrary to law, and to deprive him of the opportunity to contest his right to do so. It cannot be said that the defendant has lost the opportunity by his own laches. That would have been so, if the action and recovery had been for the same cause, but it was not negligent in the defendant to await the trial and meet the allegations of fraud upon which the order was obtained, in the forum to which the plaintiff had invited him. The power of the court below to relieve a party under such circumstances is undoubted, within the principle laid down in 30 N. Y., *supra*.

Imprisonment for debt is abolished except in certain specific cases, and if a party seeks to imprison his debtor, he must bring the case clearly within one of the enumerated exceptions, and prove it according to prescribed practice.

The order must be affirmed.

All the judges concurring, order affirmed.

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ALDEN A. CAMPBELL, Appellant, v. WILLIAM S. EVANS,  
Respondent.

The provisions of the act of 1867, chap. 814, as to the seizure of animals running at large in the public highways, are constitutional and valid. It is no objection to the proceedings to be instituted under the act, that personal notice to the owner or other claimant of the property is not made necessary by the act, or essential to the jurisdiction of the magistrates, or that such proceedings are to some extent summary.

(Argued April 11, 1871; decided April 25, 1871.)

APPEAL from a decision of the late General Term of the Supreme Court of the fifth judicial district, affirming a judgment for defendant, entered upon the report of a referee.

The action was replevin for three horses found by the defendant, an overseer of highways, running at large upon a public highway within his district, and seized and taken by him pursuant to chap. 814 of the Laws of 1867.

Immediately after making the seizure, the defendant made complaint, certified by his oath, to a justice of the peace of the town, stating the seizure of the property, describing it and the cause of such seizure, with a reference to the act, requesting a summons to the owner to appear and show cause why they should not be sold, etc.

A summons was issued by the justice, reciting the complaint and requiring the owner of the animals, or any party having an interest in them, to show cause why they should not be sold at a time specified, more than ten days from the time of issuing the same. One Ashley, who was a constable, made oath in writing that on a day specified, which was more than ten days before the return day of the summons, he served the same by posting a copy thereof in six public and conspicuous places in the town, one of said places being the district school-house, "nearest to said premises."

On the return day, the plaintiff appeared, but for no other purpose than to object to the jurisdiction of the court, and particularly on the ground that the proceedings were based

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upon an insufficient complaint. The objections were overruled and the plaintiff thereupon refused to take any further part in the proceedings, and withdrew. The justice proceeded to hear the proofs of the complaint and gave judgment for the amounts allowed by the act, amounting in the aggregate to \$30.50, including the penalty imposed upon the owner for suffering and permitting the animals to run at large. A warrant was thereupon issued and delivered to a constable for the sale of the property. After the judgment, and before the issuing of the warrant, the plaintiff demanded the horses of the defendant, and upon his refusal to deliver them, brought this action. The cause was tried by a referee, who gave judgment for the defendant, which was affirmed by the Supreme Court, and from the latter judgment the plaintiff appealed to this court.

*W. Porter*, for the appellant, cited as to the unconstitutionality of the act, *Rockwell v. Nearing* (35 N. Y., 302); *McConnell v. Van Aerman* (56 Barb., 535, note a); *Levitt v. Thompson* (56 id., 542); *Taylor v. Porter* (4 Hill, 140); *In the matter of the Empire City Bank* (18 N. Y., 216); *Westervelt v. Gregg* (2 Kern., 209, 212).

*G. N. Kennedy*, as to the constitutionality of the act, cited *Rockwell v. Nearing* (35 N. Y., 302); *U. S. Trust Co. v. U. S. Fire Ins. Co. of N. Y.* (18 N. Y., 199).

ALLEN, J. The act of 1867 (chap. 814), under which the defendant seized the plaintiff's horses, was passed to avoid the objections which this court, at the preceding March term, had held fatal to the act of 1862 (chap. 459), so far as the same authorized the seizure and sale of animals trespassing on the lands of others. The vice of that act was that it did not provide for a notice to the owner, or a judicial condemnation of the property, or an adjudication of the right to sell, but permitted a sale without giving a hearing to the owner, and without process or warrant. It is true that the court

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did not decide that the same provisions for the seizure and sale of animals found running at large in public highways, streets and parks, would be subject to the same condemnation, but, in terms, left that question undecided. (*Rockwell v. Nearing*, 35 N. Y., 302.) The amendatory act of 1867 was designed to give that "due process of law" for the condemnation and sale of animals liable to seizure and sale under its provisions, without which no person can be deprived of life, liberty or property. (Constitution, act 1, § 6.) It is not denied that the legislature had the constitutional right to prohibit the running at large of cattle in the streets and public highways of the State, and enforce the same by penalties.

It must be regarded as within the legitimate power of legislative action to protect, by proper laws and under suitable penalties, the public highways of the State, and secure to the people the free and unimpeded use of them. The subject-matter of the act was within the general powers vested in the legislature to pass such acts as, in their judgment, will conduce to the welfare of the citizens and the public good; and in its general scope and terms, its purpose and object, it is not repugnant to or forbidden by the Constitution. (*Rockwell v. Nearing*, *supra*; *Commonwealth v. Alger*, 7 Cush., 53.)

The only question on this branch of the case is, whether in the provision made for enforcing the law and giving it practical effect, the act does secure to the party whose property is seized that judicial investigation and determination to which he is entitled under the Constitution, before he can be deprived of his property.

Property cannot be confiscated by act of the legislature, or taken from the rightful owner without a forensic trial and judgment, a trial by the ordinary modes of judicial proceeding. (*Taylor v. Porter*, 4 Hill, 140; *Wynehamer v. People*, 3 Kern., 378.)

In *Westervelt v. Gregg* (2 Kern., 202), it was said that "due process of law undoubtedly means, in the due course of

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legal proceedings according to those rules and forms which have been established for the protection of private rights." The law does provide for a judicial investigation and a final judgment as a prerequisite to the sale of the property, and only authorizes a sale upon process issued by the magistrate on execution of the judgment.

It is no objection to the proceedings that personal notice to the owner or other claimant of the property is not made necessary by the act, or essential to the jurisdiction of the magistrate, or that the proceedings are, to some extent, summary. The proceedings are in the nature of proceedings *in rem*, the penalty or forfeiture attaching to and being a lien upon the offending animals. The owner may or may not be known; the animals are not in the actual possession and custody of any one, either as owner or otherwise; they are "running at large." In analogy to proceedings in other cases *in rem*, or for enforcing specific liens upon or forfeiture of property, the legislature has provided for notice, in such form and for such length of time as they thought reasonable, and best calculated to inform the owner of the proceedings, and give him an opportunity to be heard; and the mode and manner of giving the notice is neither untenable or illusory.

In admiralty and maritime proceedings, a citation by posting, as prescribed by the practice of the court, is a very usual way of acquiring jurisdiction; and, under the statutes of this State, there are various proceedings, both *in rem* and *in personam*, in which the party to be affected only has notice, by a publication or posting, of the summons or notice. Judge DENIO, in *The Matter of the Empire City Bank* (18 N. Y., 215), refers to several proceedings of this character; and other examples of the same kind might be cited. Judge DENIO says, in the case cited, "When the legislature has prescribed a kind of notice by which it is reasonably probable that the party proceeded against will be apprised of what is going on against him, and an opportunity is afforded to defend, I am of opinion that the courts have not the power to pronounce the proceeding illegal." The principle is the same when the

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proceeding is against property. A person whose cattle have been seized will be very likely to learn the fact, and of the proceedings against them, if notices are posted in six conspicuous places in the town for ten days or more. But it was peculiarly within the province of the legislature to prescribe the notice, and direct the manner of service.

The statute seems, by implication, if not directly, to require the summons to be posted for ten days.

The only object of requiring a given number of days between the issuing and return of the process is, that it may be the more likely to come to the knowledge of the party to be affected by the proceeding. This purpose can only be accomplished by a service, as well as by an issue; and, although it need not be decided in this case, such will probably be the decision should the question ever arise. Such reasonable construction should be given the act as to uphold it and carry out the intent of the legislature, rather than that which will render it void, or cause it to work an injustice, in opposition to the intent of its framers. The legislature had clearly the right to prohibit animals from running at large on the public highways; to enforce the observance of the act by penalties; to make the penalties a lien upon the cattle found running at large in violation of the act; and to authorize a distress and sale of the property for the payment of the penalties. In the act of 1867, they have exercised this power, and have, by the same act, carefully protected the right of the owner, and guarded against a sale by which he would be deprived of his property, except by the judgment of a court in the ordinary course of judicial proceedings, after an opportunity to defend, and upon a warrant to a proper officer in execution of the judgment. The judge has found that the defendant was an overseer of highways; that the horses were found by him running at large within his district; and that he seized and took them, in the proper discharge of his duty; and, as conclusion of law, that the act under which he proceeded was constitutional, and that he was entitled to judgment for a return of the property and damages for its detention.



The other findings of fact and conclusions of law are surplusage. The defendant justifies the seizure and detention of the property by virtue of his office under the statute, and not under the proceedings and judgment of the justice. His acts gave jurisdiction to the justice, and his authority is derived from the statute, and not from the acts of the magistrate. There is no complaint that, by any unlawful act or omission of duty after the seizure, he became a trespasser *ab initio*. The judge, in his findings of fact and conclusions of law, incorporated in the judgment-roll, finds that the defendant's interest in the property was thirty dollars and fifty cents, and that he is entitled to judgment for a return of the property, or the value of his interest therein, to the amount named. No objection or exception was made or taken to this part of the finding, and it is not made a part of the case. The judge, had there been no judgment by the justice, might have assessed the penalty under the statute; but, in the present case, he probably has taken the judgment of the justice as evidence of the amount of the penalty lawfully chargeable upon the property. There was no question made upon the trial as to the amount of the lien, if the defendant was entitled to a judgment for a return. The main question intended to be presented by the contest, to wit, the validity of the law, was fairly presented, and is before us upon this appeal. The questions touching the regularity of the proceedings before the justice were incidentally presented, but the action was not brought to test them; and, as a decision of these, either way, would not affect the justification of the defendant, or deprive him of the shield of the statute under which he acted, they need not be considered.

The judgment must be affirmed.

ANDREWS, J., did not sit; FOLGER, J., did not vote; all the others concurring,

Judgment affirmed.

## Statement of case.

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|      | 45  | 362 |
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|      | 45  | 362 |
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| d164 | 525 |     |

THE TRUSTEES OF THE VILLAGE OF DELHI, Appellants, v.  
WILLIAM YOUMANS, Jr., Respondent.

An action will not lie against an owner of land, who, in digging a well upon his own premises, intercepted the percolation or underground currents of water, and thereby prevented their reaching the springs or open running stream on the soil of another. The rule is different when the water has actually reached, and become a part of, the spring or stream, and is subtracted from it.

(Argued April 3d; decided April 18th, 1871.)

APPEAL from a judgment of the late General Term of the Supreme Court in the sixth district, affirming a judgment for the defendant at Special Term.

This was an action for a perpetual injunction, restraining the defendant from digging upon his own land, for a lawful purpose, the result of which was the diversion of the water, and preventing its flowing or percolating into two large and valuable springs on adjoining land, which supplied the village of Delhi with water.

*William Gleason*, for the appellants.

*Amasa J. Parker*, for the respondent. This court must decide upon the facts as found by the judge at Special Term, who acted as referee. (*Mosher v. Hotchkiss*, 3 Keyes, 161; *Farnam v. Hotchkiss*, 2 id., 9; *Marco v. Liverpool Co.*, 35 N. Y., 664; *Morgan v. Skidmore*, not yet reported; Code, §§ 267, 268, 272.) The defendant's right to lawfully dig on his own land, notwithstanding the result, is well-settled. (*Ellis v. Duncan*, 21 Barb., 239, affirmed in Court of Appeals, not reported; *Goodale v. Tuttle*, 29 N. Y., 459; *Acton v. Blundell*, 12 Mees. & Wels., 324; *Greenleaf v. Francis*, 18 Pick., 117; *Pisley v. Clark*, 35 N. Y., 520; *Radcliff's Ex. v. Mayor*, 4 Comst., 195-200; *Bellows v. Sackett*, 15 Barb., 96; *Rawstron v. Taylor*, 33 Eng. L. & Eq., 428; *Broadbent v. Ramsbotham*, 34 id., 553; *Chasemore v. Richards*, 7 House

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of Lords Cases, 349; *Frazier v. Brown*, 12 Ohio St., 294; *Haldeman v. Bruckhard*, 45 Penn., 514; *Rouille v. Driscoll*, 20 Conn., 533; *Chatfield v. Wilson*, 28 Verm., 47; *Chatfield v. Wilson*, 31 id., 358; *Harwood v. Bruter*, 32 id., 724; *Greenleaf v. Francis*, 18 Pick., 117; *Brown v. Illins*, 27 Conn., 34.) The rule of the civil law is the same. (Dig., 39, 3, 1, 12; see Washburn on Easements, ch. 3, § 7.) There is no prescriptive right, by length of user. (*Rouille v. Driscoll*, 20 Conn., 533; *Wheatley v. Baugh*, 25 Penn., 528; *Ingraham v. Hutchinson*, 2 Conn., 524, 597; Washburn on Easements, 384.

By the Court — PECKHAM, J. . If the action of the defendant took the water away from the springs, after it had reached there, after it had become part of an open, running stream, then this action would lie. (*Rawstron v. Taylor*, 33 Eng. L. & Eq., 428; *Broadbent v. Ramsbotham*, 34 id., 553; *Chasemore v. Richards*, 7 House of Lords Cases, 349; *Pisley v. Clark*, 35 N. Y., 520; *Goodale v. Tuttle*, 29 id., 459; *Ellis v. Duncan*, 21 Barb., 230, affirmed in this court, but not reported.)

But if it merely prevent the water from reaching the spring or open, running stream, by intercepting its percolation or underground currents, by digging a well upon the defendant's own land, for the use of his family and stock, this action will not lie. The law is settled in that way, both here and in England. (See same cases.)

The facts in this case, as found by the justice who tried it, do not show that the water has been taken away from the spring or running surface stream after it had reached there. On the contrary, the inference from his findings would rather seem the other way. Nor is there any request to find otherwise, nor any exception on that point.

Every inference and presumption that can be reasonably entertained must be indulged in favor of affirming a judgment. It is a well-settled rule that the party who alleges error must show it.

## Statement of case.

The doctrine of lateral support of adjoining land, cannot aid the plaintiffs' case. I do not think it has any application to the facts as found.

It may well be that the plaintiffs have been injured, legally injured, by the acts of the defendant. But the facts as found do not make it appear. In the absence of any request to find, or exception to refusal to find, other facts, we cannot consider the evidence with a view to decide whether other facts may not be regarded as sufficiently proved.

All concurring.

Judgment affirmed.

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IN THE MATTER OF THE PETITION OF THE LONG ISLAND  
RAILROAD COMPANY.

Although the twenty-second section of the general railroad act does not, in terms, declare that the commissioners, appointed in pursuance of it, shall have jurisdiction of the entire subject of the location of the route through the county in which the land of the person applying for their appointment is situated, still, that is the true intent and construction of the act. The appointment of commissioners can only be legally made after all notices required by law have been duly served, and the fifteen days have expired, within which the persons aggrieved may apply for such appointment.

The commissioners first duly appointed have exclusive jurisdiction to examine and determine in respect to all objections to the proposed location; and that determination is final upon all questions relating thereto.

(Argued April 4th, and decided April 18th, 1871.)

APPEAL from an order of the General Term of the Supreme Court in the second department, affirming an order made in July, 1870, at Special Term, which vacated and set aside an order made by BARNARD, J.

The Hunter's Point and South Side Railroad Company was organized under the general railroad act, and duly filed a map, etc. This company gave written notice of location of their route to one Furman, an actual occupant of land over which the location was made. On the petition of Furman, commission-

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Opinion of the Court, per ANDREWS, J.

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ers to examine the route were appointed, and duly made and filed their determination as to the route, according to law. Afterward, notice of such location was given to the Long Island Railroad Company, on petition of which company, BARNARD, J., made an order appointing new commissioners to examine such route. Upon an affidavit of one Cullen, reciting the proceedings of the Furman commission, and, upon such proceedings, the Supreme Court, at a Special Term, vacated and set aside the order made by BARNARD, J. From this order an appeal was taken to the General Term, and the order there affirmed; from such determination, an appeal is now taken to this court.

*A. J. Vanderpoel*, for the appellants.

*Edgar M. Cullen*, for the respondent.

ANDREWS, J. Upon filing articles of association, in conformity with the provisions of the general railroad act, a corporation is created, with power to construct a railroad between the places and through the counties designated therein. But the particular route of the proposed road is not left to the discretion of the corporation. It is to be determined by the proceedings and in the manner prescribed in the twenty-second section of the act.

The location of the route is, in its nature, a proceeding preliminary to the acquisition of land therefor by appraisal and condemnation; and the statute regulations must be complied with before the route can be located.

The filing of the profile and map, required by that section, is not the location of the route, but the proposal of one, which may or may not become the actual route, as shall be determined by the subsequent proceedings.

It is obvious, from the examination of the twenty-second section, that the leading objects of that section were, first, to give to each occupant of land through which the proposed route passes an opportunity to object to the intended loca-

tion, and to be heard in respect to such objection; and, second, to constitute a special tribunal to determine and fix the location, after hearing and considering the objections which may be made.

The company are required to give written notice of the route designated upon the map and profile filed, to all occupants of the land to be affected; and any party feeling aggrieved by the proposed location is authorized, upon petition setting forth his objections, to apply, within fifteen days after service of such notice, to a justice of the Supreme Court out of court, for the appointment of commissioners to examine the proposed route and hear the parties.

The statute does not, in terms, declare that the commissioners, appointed in pursuance of it, shall have jurisdiction of the entire subject of the location of the route through the county in which the land of the person applying for the appointment is situated; but this is, we think, the true intent and construction of the act.

The map and profile of the proposed route, through each county, is to be filed in the clerk's office of such county; the commissioners are to examine the proposed route; and they are authorized to affirm or alter it, as may be consistent with the "just rights of all the parties and the public," and their determination, duly certified, is to be filed in the office of the county clerk.

It is true that the appointment of commissioners may be made upon the application of a single person aggrieved; but a construction, which would confine their jurisdiction to an inquiry as to the proposed route over the land of the applicant, would be impracticable and defeat the intent of the act. It would allow new commissioners to be appointed upon the application of any other party aggrieved, and each set of commissioners could indirectly nullify the action of those preceding them.

The statute contemplates that the commissioners first duly appointed shall have exclusive jurisdiction to examine and determine in respect to all objections to the proposed location,

and their determination is final upon all questions relating thereto.

The appointment of, and proceedings by the commissioners are, however, to be regulated so as to give effect to the provision which secures to each party interested an opportunity to be heard before his rights are adjudicated.

If commissioners appointed upon the application of one party could act before notice of the proposed location had been given to others whose lands are included within it, their right to be heard might be foreclosed, and they deprived of the benefit which the statute intended to secure to them. Such a construction, overruling the plain intention of the act, cannot be admitted.

Effect can be given to all its provisions, upon the construction of which we think the section is capable, viz., that the appointment of commissioners can only be made after all notices required by law have been served, and the fifteen days have expired within which the persons aggrieved may apply for such appointment.

Each person entitled to notice, if he objects to the proposed route and desires to be heard, must, by the express terms of the section, apply for the appointment of commissioners within the prescribed period; but the officer to whom the application is made cannot act upon the application and appoint commissioners, unless all persons entitled to notice have been served. In the meantime, the rights of the applicant are preserved, and the location of the road remains in abeyance.

These considerations dispose of this case. The proceedings instituted by Furman were commenced and concluded before any notice under the twenty-second section was served on the appellant.

The appointment of commissioners upon Furman's application was premature and unauthorized, and the subsequent proceedings were void.

These proceedings were no impediment to the application of the appellant; and the court erred in setting aside the order appointing commissioners upon it.

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Statement of case.

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It does not appear affirmatively, by the petition or order in the proceedings on the part of the appellant, that all persons entitled to notice had been served, when that order was made.

In the absence of evidence to the contrary, and in view of the peculiar language of the statute, this fact will be presumed in favor of the jurisdiction of the officer making the order.

The order of the General Term was appealable, within the decisions of this court. (*People v. Boardman*, 4 Keyes, 59; *In re Rens. & Sar. R. R. Co.*, 43 N. Y., 137.)

The order appealed from should be reversed, with costs.

Ch. Judge and GROVER and RAPALLO, JJ., concur.

ALLEN, J., concurs in the result, on the ground that Supreme Court had no jurisdiction to set aside the order of Judge BARNARD, appointing commissioners under the statute, on motion. 2d. The petitioners were entitled to the appointment of commissioners, upon making application within fifteen days after the notice of the location and route of the road, and were not concluded by the action of commissioners before those appointed upon the application of other land owners; and expresses no opinion as to the other matters considered in the opinion.

PECKHAM, J., concurs in the result, on the ground that Supreme Court had no jurisdiction in the premises.

FOLGER, J., concurs in the result.

Order reversed.

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CHARLES T. WOOD et al., Appellants, v. SOMERS MOREHOUSE et al., Respondents.

Executions to sell real estate cannot be issued after the death of the defendant, without an opportunity for heirs and terretenants to be heard; and the judgment must be revived against them.

But when an execution has been actually issued and partially executed, as by the commencement of the publication of notice of sale thereunder, the subsequent death of the debtor does not affect the process or prevent its complete execution by sale of the property.



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Statement of case.

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In the absence of proof to the contrary, it will ordinarily be presumed in favor of a sale under execution, that the sheriff has duly posted the proper notices of sale, in accordance with the maxim, *omnia præsuntur rite acta*.

The publication of a sheriff's notice of sale of real estate under execution is sufficient, if inserted once in each week for the six weeks before the sale, although six full weeks should not have elapsed between the date of the first publication and the day of sale.

The statute (2 R. S., 269, § 40), providing that the omission of the sheriff to give the notice of sale required should not affect the validity of the sale made to a purchaser in good faith without notice of the omission, applies to a sale to the judgment creditor, although he pays no money, and the amount of his bid is merely credited upon the execution.

Where a junior judgment creditor applies to redeem to the assignee of the sheriff's certificate of sale, the acceptance of the money and transfer of the certificate by the assignee is a waiver of the production by the junior creditor of evidence of his right to redeem; and as the requirement of such production is for the benefit of the holder of the certificate, his waiver renders such production unnecessary to the validity of the sheriff's deed given to the creditor so redeeming.

A sheriff may waive the recording of the assignment of certificate of sale, and give a deed to the assignee, without requiring it.

(Argued April 6th, and decided April 18th, 1871.)

APPEAL from a judgment of the late General Term of the Supreme Court in the fifth district, affirming a judgment dismissing the complaint on a trial before the court without a jury.

The plaintiffs, children and heirs-at-law of Theodore Wood, who died in October, 1838, bring this action to redeem certain premises, of which their ancestor died seized, from a mortgage which had been given by the grantor of the ancestor prior to the conveyance to him. The mortgage was a purchase-money mortgage, given by one Cowing to Daniel Kellogg, in October, 1835. In 1837 Cowing conveyed to Wood, subject to the mortgage. The premises descended to the plaintiffs upon the death of their father, and in 1841 the executors of the mortgagee brought their action in the Court of Chancery to foreclose the mortgage. The plaintiffs were then infants, were not made parties to that action, and in 1843 the premises were sold by a master, under the decree in that action, and pur-

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Statement of case.

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chased by the complainants therein, and the premises are now occupied by purchasers and grantees in good faith, under the title thus acquired. In January, 1838, one Pratt had recovered a judgment in the Supreme Court against Wood, which was a lien on the premises, and an execution was issued to the sheriff, returnable in October, 1848. Under that execution the premises had been advertised for sale prior to the death of Wood. The notice was dated on the 26th of September, and first published in a weekly newspaper issued as of that date, and was for the first day of November. It was published once in each week for six weeks before the sale. The evidence did not show the posting of the notice of sale, and the judge found that there was not six full weeks between the date of the notice, as published, and the day named for the sale, and, as a matter of fact, that such notices were not posted in three public places six weeks before the day of sale mentioned therein, but that the same were posted for more than five weeks before that day. At the sale, the premises were bid off by the plaintiff in the execution, and a certificate of sale given him, in which was inserted a copy of the printed notice of sale, with a reference to it for a description of the premises sold, and a duplicate certificate was filed in the office of the county clerk. No money was paid at the sale, but the sale and the amount at which the premises were sold were indorsed by the sheriff on the execution, which has never been returned.

The judge finds that neither the purchaser at the sale, nor any of the persons who became assignees of the certificate, had any knowledge or actual notice that the notice of sale had not been regularly posted for the full time required by law. This certificate of sale was assigned by the purchaser to one Phillips, and by him to one Johnson, and by the latter to Henry Davis, Jr., before the giving of the deed by the sheriff. In May, 1838, one White recovered a judgment against Wood in the Supreme Court, which was also a lien on the premises, which judgment was assigned to Davis during the same year. Before the expiration of fifteen months from the day of sale under the execution, and while Johnson was the owner of the

## Statement of case.

certificate of sale, Davis presented to him the proper evidence of his right as a judgment creditor to acquire the title of the purchaser under the sheriff's sale, and paid to him the amount required to be paid for that purpose, which was accepted by Johnson, who thereupon assigned the certificate to Davis. The sheriff, after the expiration of the time allowed creditors to redeem, executed a deed of the premises to Davis, the deed reciting that Davis acquired the right to the deed by a redemption from Johnson. This deed was delivered before the commencement of the foreclosure proceedings, but was not recorded. The court, at Special Term, gave judgment for the defendants, dismissing the complaint, which was affirmed at the General Term, and the plaintiffs have appealed to this court.

*W. Porter*, for the appellant. Heirs-at-law, not made parties to a purchase, are not affected thereby. (10 John., 356; 20 N. Y., 412.) The sheriff's sale was void, the notices not being posted for the required length of time. (2 R. S., 368, § 34; *Oloott v. Robinson*, 20 Barb., 148; S. C., 21 N. Y., 150; Sugden on Powers, 212, § 3.) Where the only consideration is the part payment of a precedent debt owing to the purchaser, he is not a purchaser in good faith. (*Coddington v. Bay*, 20 John., 637; *Lawrence v. Clark*, 36 N. Y., 128; *Wood v. Robinson*, 22 N. Y., 564; *Dickerson v. Tillinghast*, 4 Paige, 215; *Stalker v. McDonald*, 6 Hill, 93; *Van Heusen v. Radcliffe*, 17 N. Y., 583; *Spear v. Myers*, 6 Barb., 445; *Mickles v. Colvin*, 4 Barb., 304; *Scott v. Howard*, 3 Barb., 319, 321; 10 Barb., 97, 107.) Pratt, and the subsequent assignees of the certificates had sufficient notice of the sale. (*Acer v. Wolcott*, 1 Lans., 193.) An execution constitutes a mere naked power to sell. (*Catlin v. Jackson*, 8 John., 548; *Wood v. Colvin*, 5 Hill, 228; *Steynett v. Brooks*, 10 Wend., 212.) A strict compliance with the requirements of the statute, is necessary to give validity to a sheriff's deed to a redeeming creditor. (*Ex parte Bank of Monroe*, 7 Hill, 177; *People v. Sheriff of Broome*, 19 Wend., 89; *Gilchrist*

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v. *Camfort*, 31 N. Y., 235; *People v. Ransom*, 2 Comst., 493; *Waller v. Harris*, 20 Wend., 555; *Hardman v. Bowen*, 39 N. Y., 196; *Juliand v. Rathbone*, 39 N. Y., 369; *Torrey v. Milsbury*, 21 Pick., 64.) As to the effect of the master's deed, see *Smith v. Gardner* (42 Barb., 356); *Butler v. Viele* (44 Barb., 166); *Lawrence v. Delano* (3 Sandf., 333); *Brainard v. Cooper* (10 N. Y., 358, 359). The presumption that an officer has done his duty obtains only as against the public, and not against an individual, where title is sought to be subverted. (*Bonner v. Eastman*, 50 Barb., 639; *Stryker v. Kelly*, 2 Denio, 323; *Adams v. S. & W. R. R. Co.*, 10 N. Y., 330.)

*D. Pratt*, for the respondent. It is not necessary that the first insertion of an advertisement be full six weeks before the sale. (*Olcott v. Robinson*, 21 N. Y., 151; *Sheldon v. Wright*, 7 Barb., 39; S. C. 1 Seld., 497; *Bachelor v. Bachelor*, 1 Mass., 255; 2 R. S., 369.) The plaintiff in an execution, who bids in the property is deemed a *bona fide* purchaser, within the meaning of the statute. (*Wood v. Chapin*, 3 Kern., 509, 519, 270; *Cunningham v. Cassidy*, 17 N. Y., 276; *Mohawk Bank v. Atwater*, 2 Paige, 54; *Jackson v. Nelson*, 18 John., 355; *Wilson v. Neilson*, 5 Barb., 565.) As to the term, good faith, see 2 R. S., 359, § 4, and 369, § 40; *Tufts v. Tufts* (18 Wend., 621); *Petit v. Shepherd* (5 Paige, 493); *Scott v. Harward* (3 Barb., 319.) A *bona fide* purchaser without notice, from one who purchased with notice, is protected. (*Varick v. Briggs*, 6 Paige, 323; *Jackson v. Elstan*, 12 John., 452; *Wood v. Chapin*, 3 Kern., 507.) The same is true as to fraud. (*Bumstead v. Platner*, 1 John. Ch., 213; *Jackson v. Walsh*, 14 John., 407; *Jackson v. Henry*, 10 John., 185; *Froger v. Peck*, 1 Barb. Ch., 220.) The recitals in the deed are presumptive evidence of their truth. (*Wood v. Chapin*, 3 Kern., 509; *Hartwell v. Root*, 19 John., 345; 1 J. J. Marshall, 447; 3 Gill. & J., 1 McCord, 212; 10 Mass., 105; Caine's Cas. in Error, 18; Cowen & Hill's notes, 297, 362.) The failure to duly file the assign-

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Opinion of the Court, per ALLEN, J.

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ments, does not affect the validity of the sheriff's deed. *Chautauqua County Bank v. Risely*, 4 Denio, 489; *People v. Ransom*, 4 Denio, 145; *Bank of Vergennes v. Warren*, 7 Hill, 94 *supra*.) At common-law, an execution issued after the death of the defendant was valid if tested before his death. *Center v. Billinghamurst*, 1 Cow., 33; 1 Ld. Raymond, 695; 3 P. Williams, 399; Tidd's Practice, 587; *Nichols v. Chapman*, 9 Wend., 452; *Day v. Rice*, 19 Wend., 644; *Clere v. Veer*, Cro. Car.; *Waghome v. Langmead*, 1 B. & P., 571; *Watson v. Markell*, 4 Moore & S., 461; S. C. 2 Dowl. Pra. R., 810.) An execution issued before, can be properly executed after defendant's death. (*Den v. Hillman*, 2 Halsted, 180; 1 Cow., 33 *supra*; Gra. Pr., 351, 807; 3 Bacon's Abr. Ex. G., 2; 8 Bac. Abr. sci., fa. C., 4.)

ALLEN, J. If the sheriff's sale and the conveyance to Davis in pursuance of such sale were effectual to divest the plaintiffs of their estate and interest in the mortgaged premises, the complaint was properly dismissed, as the equity of redemption had, before the foreclosure, become vested in another. The execution upon the judgment had issued, and the premises had been advertised for sale by the sheriff, during the life of the judgment debtor, but the sale was made and the proceedings completed after his death. Process having been issued for the collection of the judgment by the sale of the real property of the judgment debtor, and its execution commenced by an advertisement of the mortgaged premises for sale, in pursuance of the statute, the execution of the process was not arrested by the death of the judgment debtor. The sheriff could lawfully complete the execution of the process thus commenced. At common-law, an execution against the goods and chattels of a judgment debtor was regular, if tested in the lifetime of the debtor, although actually issued after his death. (*Center v. Billinghamurst*, 1 Cow., 33; *Robinson v. Tonge*, 3 P. Wms., 398; *Nichols v. Chapman*, 9 Wend., 452; *Day v. Rice*, 19 id., 644.) But an execution cannot be issued after the death of the defendant, which will authorize the sale

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of the real estate which may be bound by the judgment. An execution cannot be sued out against heirs or terretenants without giving them an opportunity to be heard. (*Stymets v. Brooks*, 10 Wend., 206.) The judgment must be revived against them. The rule is, that when a new person, who was not a party to a judgment, derives a benefit by, or becomes chargeable to, the execution, there must be a *scire facias* to make him a party to the judgment before execution can issue. (2 Saund., 6, note.) But if either plaintiff or defendant dies, or any other change of interest occurs, after execution issued and partially executed, the rule does not apply. The execution creditor cannot be deprived of the benefit of his execution by the death of the debtor before an actual sale of property or the completion of its service. The lien of the judgment dates from the time of entry and docket, and the execution is the means by which the fruits are secured to the plaintiff. The execution, being regular and authorizing the sale of the property, is not vitiated or defeated by a change of interest or of parties after its issue.

There is no process known to the law by which a party can have judgment for completing the service of an execution against heirs or terretenants, which has been regularly commenced against the original debtor. A *scire facias quare executionem non* issues against representatives or heirs or terretenants, as occasion requires, when no execution has been issued which can be enforced, and to give the party entitled the benefit of that process and the fruit of his judgment. (2 R. S., 576.) By *scire facias*, the person to whom it is addressed has an opportunity to show cause why an execution shall not issue against him or his property, and not to show cause why an execution regularly issued and partially executed should not be fully executed. If there be judgment against A, and thereupon a *fi. fa.* be sued out, but before execution A dies intestate, there needs no *sci. fa.* to revive the judgment, but execution of the goods may be made in the hands of the administrator; for, as the party himself could not have made any defence to the writ of execution, there is no reason

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that his representatives should be in a better condition. (*Farrer v. Brooks*, 1 Mod., 188.) The same principle applies to executions against real property, the only difference being that, at common-law, in the one case by a fiction, the issuing takes effect by relation, as of the day of the *teste* of the writ, and in the other, it has effect from its actual issue. In *Den v. Hillman* (2 Halst., 180), the execution had been sent to the clerk to be sealed, in sufficient time for him to have sealed it before the death of the defendant in the judgment; but, whether the seal was affixed before the death, was left in doubt. The execution was issued, and real estate sold under it, and the court below held the sale valid, and that the title of the heirs was divested. By implication, the statute permits the completion of the execution of a judgment issued during the life of the defendant, after his death. It provides that, if a party dies after judgment, but *before execution issued*, no execution shall issue on such judgment until the expiration of one year after the death. (2 R. S., 368, § 27.) It does not arrest the proceedings upon an execution already issued, but prohibits its issue for a limited period, and its operation is restricted to cases where the party dies before execution issued. The sheriff had authority to complete the service of the execution by the sale of the property, notwithstanding the death of Wood, the defendant debtor. The regularity of the sale was not affected by the fact that the notice of sale was not published for six full weeks, that is, that six full weeks did not intervene between the day of the first publication of the notice and the day fixed for the sale. The statute was complied with by a publication once in each week for six weeks before the sale. (2 R. S., 368, § 34; *Olcott v. Robinson*, 21 N. Y., 151.)

The learned judge, by whom the case was tried at Special Term, has found as a fact that the notice of sale was not posted for the full time of six weeks prior to the day of sale, as required by law. (2 R. S., *supra*.) I am of the opinion that the finding was without evidence and against evidence. The omission to post the notice was an affirmative fact, to be proved by the plaintiffs. The statute imposes the duty of affixing the

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notices upon the officer making the sale, and subjects him to a penalty of \$1,000 for selling real estate without the previous notices prescribed by the act. (2 R. S., 269, § 37.) Neglect of duty by a public officer will not be presumed, but must be proved (Per cur., *Den v. Hillman*, *supra*); and, in support of his acts, the familiar maxim, *omnia, præsumuntur rite esse acta*, stands for evidence of the fact, in the absence of any other evidence. When a person is required to do an act, the not doing of which would make him guilty of a criminal neglect of duty, it shall be intended that he has duly performed it, unless the contrary be shown. *Stabit præsumptio donec probetur in contrarium*. (Broom's *Max.*, 429; *Jackson v. Shaffer*, 11 Johns., 513; per DENIO, J.; *Wood v. Chapin*, 3 Kern., 509-516.) But, assuming the fact as found, it is neutralized by the additional fact, which is also found, that neither Pratt, the purchaser at the sale, nor the subsequent assignees of the certificate or the grantee of the sheriff, "had any knowledge or actual notice that the said notice of sale had not been regularly posted for fully the time required by law," and that they were each purchasers for a valuable consideration in good faith. It is declared by statute that the omission of any sheriff or other officer to give the notice of sale required by law shall not affect the validity of any sale made to a purchaser in good faith without notice of any such omission. (2 R. S., 269, § 40.)

In *Wood v. Chapin* (3 Kern., 509) it was held that a creditor, purchasing land at a sale by virtue of judicial proceedings instituted to collect his debt, is a purchaser for a valuable consideration within the recording act, although the entire purchase-price, except so much as is required to satisfy the expenses of the proceedings, is applied in payment of the debt. The recording acts only protect purchasers in good faith, and for a valuable consideration, against non-recorded conveyances. (1 R. S., 756.) In addition to *bona fides* on the part of the grantee, the statute, in express terms, makes a valuable consideration indispensable. The omission of this, in the statute protecting purchasers against a defective notice of sale by sheriffs, is some evidence that there may be a purchaser in good



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faith, who has not parted with value; and there may be a reason for this in a desire to make effectual all sales by an officer under judicial process. Under the statute, which declares that a judgment shall cease to be a lien upon lands after ten years, as against "purchasers in good faith" (2 R. S., 359, § 4), all are purchasers in good faith, and within the benefit of the statute, except those who purchase with an actual fraudulent intent. (*Tufts v. Tufts*, 18 Wend., 621; *Little v. Harvey*, 9 id., 157; *Pitts v. Shephard*, 5 Paige, 493.) The statute under consideration requires, in addition to good faith, that the purchaser should have become such without notice of the irregularity or defect in the proceedings; but it does not require that he should be a purchaser for value, that is, that he should have parted with value, or, in other words, that, in addition to the other qualifications, he should be a purchaser for a valuable consideration, to bring him within its protection. *Wood v. Robertson* (22 N. Y., 564) arose under the statute regulating uses and trusts, protecting purchasers "for a valuable consideration" against resulting trusts. In *Dickerman v. Tillinghast* (4 Paige, 215), the question considered was, as to what constituted a "purchaser in good faith and for a valuable consideration," under the recording acts. Neither of these cases furnish a rule for the construction of the statute before us. The question presented upon this appeal is one of legal right, dependent upon the construction of a statute, and is not within or governed by the rules of equity which protect legal titles and the rights of the true owner against claims not founded upon a valuable consideration. The certificate was but the evidence of the purchase, and was delivered to the purchaser after the sale; but, if its delivery was cotemporaneous with the sale, the printed notice incorporated in it, bearing date less than forty-two days before the day fixed for the sale, was not notice that the advertisement had or had not been posted the time required by law. The sale was a valid sale to Pratt.

That Davis, as the assignee of the White judgment, had a right to acquire the title of the purchaser at the sheriff's sale,

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by complying with the statute, is not denied. The statute authorizes the payment of the sums to be paid by creditors having the right to acquire the title of the purchaser, to be made to the purchaser, his representatives or assigns, or to the officer who made the sale. (2 R. S., 373, § 59.) The money, in this instance, was paid to and accepted by Johnson, the assignee of the certificate; and, whether any evidence of the right of Davis to purchase was presented to or left with him or with the officer, is not material. The production of evidence of a right to redeem is for the benefit of the purchaser or other person holding the certificate of sale, and he may waive it or accept evidence far short of that prescribed by statute; and an acceptance of the money and an assignment of the certificate is incontrovertible evidence of such waiver. No person can object to the regularity of the proceeding to acquire the title except him who has the certificate, and, but for the proceeding, would be entitled to receive the deed. (*Merritt v. Hasbrouck*, 1 Wend., 46; *Bank of Vergennes v. Warren*, 7 Hill, 91.) But there can be no doubt that the evidence of the right to purchase not only may, but should, be presented to and left with the person to whom the money is paid, and that a tender of the evidence to the assignee of the certificate, with the money required to be paid, would be a compliance with the statute. That, for the sake of brevity, and to avoid repetition, representatives and assignees are not mentioned in the section prescribing the nature of the evidence to be furnished of the right to redeem, proves nothing. The acquisition of the title of the purchaser by a creditor is a single act, including the production of the evidence of right and the payment of the money; a single transaction with the same person, either the holder and owner of the certificate or the officer making the sale. Certificates of sale of real property by sheriffs, on execution, were assignable, like every other chose in action or property interest, prior to the passage of the act of 1835. That act (ch. 189) requires all assignments to be proved or acknowledged and filed with the county clerk to entitle the assignee to a deed from the sheriff, and

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exempts from the operation of the act all assignments of certificates theretofore made. This act was for the protection of the sheriff; and a compliance with it may be waived by him. A deed to the person entitled, either as assignee or as having acquired the right of an assignee as a creditor under the statute, is valid, although the assignments have not been proved, acknowledged or filed. (*Bank of Vergennes v. Warren, supra*; *Chautauqua County Bank v. Risley*, 4 Denio, 480.) The objections to the title of Davis under the sheriff's deed are not tenable; and by that sale and conveyance the title of the plaintiffs was divested, and they were not, at the time of the foreclosure, the owners of the equity of redemption in the mortgaged premises. Davis, the rightful owner, has yielded to the title of the purchaser at the foreclosure sale, and, whether he could at any time have questioned it, is not material. It would seem that he could not; but, be that as it may, the plaintiffs claim adversely to him, and not under his title.

The complaint was rightly dismissed, and the judgment should be affirmed.

All concurring except ANDREWS, J., who did not sit, and RAPALLO, J., not voting.

Judgment affirmed.

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JAMES RODGERS, Appellant, v. JAMES BONNER et al.,  
Respondents.

To constitute a levy upon real estate under an attachment, nothing more is required to be done by the officer, than some act with intent to make the property liable to the process. This will constitute a seizure, and create a lien against the debtor, and all claiming under him by title subsequently acquired, except *bona fide* purchasers and encumbrancers.

Where a levy is made upon real estate, under an attachment, it is not necessary that the officer making the levy, should leave with the person in possession a certified copy of the warrant of attachment.

A judgment lien is not an encumbrance within the meaning of section 182 of

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the Code. A judgment is not a specific lien upon any specific real estate of the judgment debtor, but a general lien upon all his real estate; subject to all prior liens, either legal or equitable, irrespective of any knowledge of the judgment creditor as to the existence of such liens.

(Argued April 6th; and decided April 18th, 1871.)

APPEAL from the judgment of the late General Term of the Supreme Court in the fifth judicial district, affirming a judgment for the defendants upon the report of a referee.

This action was commenced for the purpose (1) of having a conveyance by the defendant, Bonner, to his wife, declared void as against the plaintiff's judgments, (2) of establishing the priority of the lien of the plaintiff's judgments upon said property conveyed, and for the payment of the proceeds of the sale thereof, in the hands of the sheriff, to the plaintiff to apply on these judgments; and (3) to restrain the sheriff from making a return to certain attachments, declaring a levy by virtue thereof, upon certain real estate, on the 26th of November, 1866. At this date, Crouse & Co., commenced actions against Bonner, and procured from MORGAN, J., two warrants of attachment against said Bonner. On the same day, in the afternoon, the sheriff proceeded to the house occupied by Bonner, for the purpose of attaching Bonner's books, and while there, without asserting any claim under the attachments, made a minute of the numbers of the houses and lots, upon a loose piece of paper. The next morning (7 A. M.) his clerk indorsed on the attachment the following: "County of Onondaga, ss: I have executed the within writ by attaching all the property of the defendant to be found in my county, and making and filing an inventory and appraisal thereof in due form, and taking possession of such property. On the same day, November 27th, 1866, at 9 o'clock, A. M., the plaintiffs perfected and docketed their judgments against Bonner. Executions were issued, and returned unsatisfied before the commencement of this action. Notices of *lis pendens* in the attachment suits were filed in the Onondaga county clerk's office, April 9th, 1867. May 28th, 1867, the lot belonging to Bonner was sold by the sheriff on an execution, on a judgment in favor

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of one Pelton, against Bonner, and bid off by Crouse & Co., leaving a balance of between \$1,300 and \$1,500, after satisfying the Pelton judgment, to be applied on the plaintiff's, or Crouse & Co.'s judgment, according as either should be entitled by priority of lien, the plaintiff by reason of his judgments, docketed November 27th, or the defendants, Crouse & Co., by virtue of the attachments issued on the 26th. No copy of the attachments or inventories were served upon Bonner.

*W. Porter*, for the appellant. The attachments did not become a lien until a seizure or levy under them. (*Buckhardt v. McClellan*, 15 Abb., 243, note.) In some of the States, it is held that in order to constitute a levy upon either real or personal property, the acts of the officer in relation to it must be such as to place it in *custodia legis*. (*Doe v. Taylor*, 13 How., U. S., 287; *Massie v. Long*, 2 Hammond, R., 287, 290; *Allen v. Parish*, 3 Hammond, R., 187; *Lucas v. Doe*, 4 Ala., N. S., 679; *Allen v. Portland Stage Co.*, 8 Maine, 207.) The doctrine of relation is a fiction and is not allowed to prejudice rights or interests of third parties or strangers. (*Heath v. Ross*, 12 John., 140; *Jackson v. Baird*, 4 John., 230; *Price v. Hall*, 41 Barb., 141.) The officer should openly claim to seize the land under the attachment. (*Leonard v. Vandenburg*, 8 How., 78.) As to the construction of the statute. (*United States v. Fisher*, 2 Cranch., 399; 4 Neville & Manning, 426; 1 Kent's Com., 519, note *b.*, 8th ed.; *Jackson v. Gilchrist*, 15 John., 89.) The omission of the defendants to file notices of *lis pendens*, until after the docketing of plaintiff's judgment, gave the plaintiff's judgment priority. (Code, § 132; Hoffman's Pro. Rem., 427; Thompson's Pro. Rem., 412; *Fitzgerald v. Blake*, 28 How., 110; *Leonard v. Vandenburg*, 7 How., 382.) The rule allowing returns of officers to be read in evidence, is based upon their responsibility, for the truth or falsity of such returns. (2 Cow. & Hill's notes, 1035; *Hathaway v. Goodrich*, 5 Verm., 65; *Gyfford v. Woodgate*, 11 East, 299;

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*Davis v. Clements*, 2 N. H., 390.) When an officer's certificate becomes a return. (3 Bouv. Inst., 189; 5 Jac. Law Dic., 523.)

*D. Pratt*, for the respondents. What shall constitute a legal seizure of real estate under an attachment must depend upon the practice as established by the courts. (Code, § 232; 2 R. S., p. 4, §§ 7, 8.) It is not necessary that the officer go upon the premises, or make any public proclamation of the seizure. (*Burkhardt v. McClellan*, 15 Abb., 243, note; *Perrin v. Everett*, 13 Mass., 128; *Grosley v. Allen*, 5 Greenl., 455; *Taylor v. Mixer*, 11 Pick., 341.) The officer has a reasonable time in which to make the return. (*Greenleaf v. Mumford*, 30 How., 30.) The general description that he had attached all the property of the defendant found in the county was a sufficient levy. (Cases *supra*.) The sheriff's return is conclusive in a collateral action. (*Leonard v. Vandenburg*, 7 How., 379, affirmed 8 How., 77; *Perrin v. Everett*, 13 Mass., 128; *Evans v. Parker*, 26 Wend., 622; *Story v. Kelly*, 2 Paige, 418.) The inventory should be filed with the clerk of the court. (*Wood v. Chapin*, 3 Kern., 509.)

GROVER, J. An attachment issued in an action pursuant to section 227 of the Code, is not a lien upon the property of the debtor, either real or personal, until the property is levied upon by the officer by virtue of such process. (*Burkhardt v. McClellan*, Court of Appeals, March, 1862; 15 Abb., 243, note; *Leonard v. Vandenburg*, 8 How., 77.) For the purpose of a levy of an attachment upon real estate, it is not necessary that the officer should go upon or even see the land. (*Burkhardt v. McClellan*, *supra*; *Perrin v. Everett*, 13 Mass., 128.) As to personal property, the rule is different. As to the latter, to constitute a levy of an execution, the officer must not only have the property in his view, but also within his power; and, in addition, must exercise such dominion over it, as to make him a trespasser except for the protection of his process. (*Camp v. Chamberlain*, 5 Denio,

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198.) The levy of an attachment requires the same acts. The difference results from the nature of the property. As to personal property, consisting of goods capable of manual delivery, the officer has the right, and, in judgment of law, actually does take it into his possession; while, as to real, he has no right, by virtue of his process, to interfere with the possession in any respect. As to the latter, the debtor cannot be disturbed in his possession by virtue of the attachment, nor can his title be thereby divested; nor can this be done by any proceeding in the action, except by sale upon execution issued upon a judgment recovered therein. Both the statute and the cases are silent as to what particular acts are necessary to constitute the seizure of real estate under an attachment. The Code (section 232), provides that the sheriff shall proceed upon the attachment in all respects in the manner required of him by law in case of attachments against absent debtors; shall make and return an inventory, etc., and keep the property seized by him, or the proceeds of such as may be sold to answer any judgment which may be obtained in the action, etc. It is manifest that the provision as to keeping the property seized has no application as to real estate, for the reason that the officer has no right to interfere with the possession. In respect to absent debtors, the statute (2 R. S., 4, § 7), provides that the sheriff shall immediately attach all the real estate of such debtor, and all his personal estate, etc., which he shall safely keep, to be disposed of as provided by the act. Section 8 provides that he shall immediately, on making such seizure, with the assistance of two disinterested freeholders, make a just and true inventory of all the property so seized, and of the books, vouchers and papers taken into his custody, stating therein the estimated value of the several articles of personal property, and enumerating such of them as are perishable. Then, again, we see an important distinction made between personal and real property seized. The estimated value of the former must be stated in the inventory. No such thing is required as to the latter. This distinction was made for

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the reason that possession of personal property was to be taken by the officer, and he made responsible for its safe custody, while he had no right to interfere with the possession of the latter, and was not charged with any responsibility after due service of the process thereon. The officer not being authorized to interfere in any manner with the possession of real estate, the question arises as to the meaning of seizure, as used in the statute. We have already seen from the cases cited *supra*, that the attachment does not become a lien upon real estate before its seizure by the officer. That this seizure is not any interference with the possession, either actual or constructive. The seizure of real estate can therefore require nothing more than the doing of some act by the officer, with intent to make the property liable to the process. This will constitute a seizure and create a lien upon the property against the debtor, and all claiming under him by title subsequently acquired, except *bona fide* purchasers and encumbrancers. The inquiry in the present case is, whether such an act was performed by the sheriff upon the evening of the 26th of November, the appellant's judgment not having been docketed so as to become a lien upon the property until nine o'clock the next day. The judge finds, and his finding is sustained by the evidence, that the sheriff on the receipt of the attachment in question, made a levy upon certain personal property, and then proceeded to the house in question, No. 101 Fayette street, where the defendants Bonner and wife then resided, to look for the books of account of Bonner and Pelton, on which to levy the attachment, but was unable to find them there. That he did not inform Bonner or his wife that he had or should seize the house and lot on the said attachment, but he did, in fact, on that day make a pencil memorandum on a loose piece of paper of said house and lot with the intent to seize the same on said attachment. On the next morning, between seven and eight o'clock, an indorsement was made upon said attachment not signed by the sheriff, by which it was claimed that he had on the 26th day of November, seized upon said attach-



ment all the property of said defendants therein. This indorsement was made by a clerk in the office and was not signed by the sheriff, for the reason that he thought that it was not particular enough in mentioning such seizure, and that it ought to mention the real estate. These were the only acts done before docketing the judgment of the appellants. The inquiry is, whether either or both constituted a seizure of the house and lot in question. I think the memorandum made on the 26th, with the intent to seize the house and lot upon the attachment was sufficient for that purpose, unless real estate comes within section 35 of the Code, requiring a certified copy, etc., to be left with the debtor or person holding the property, which will be hereafter considered. The counsel for the appellant ably argues that this cannot be so, for the reason that the sheriff did not inform Bonner and his wife of his intention to attach the house and lot, and cites in support of his proposition cases relating to a levy upon personal property. But these cases are not analogous for the reasons above stated, namely, that a levy cannot be made upon personal property, without reducing it to the actual or constructive possession of the officer, which is the reason requiring that his act should be notorious. This reason does not apply to a levy upon real estate, the possession of which cannot be interfered with. The failure of the sheriff to inform Bonner and wife, was evidence tending to show that he had no intention to seize the house and lot upon the attachment. But the testimony of the officer, that he made the memorandum with that intent was competent. When the intent with which an act is done is material as to the effect of the act, it is clear that the testimony of the person doing the act, or other testimony tending to show the intent, is competent for that purpose. The judge having passed upon the question, and there being proof to sustain his finding, it is conclusive upon this court. The counsel for the appellant further insists, that assuming a seizure to have been made, the lien thereby created was lost by the failure of the sheriff to return the inventory to the officer issuing the attachment, as required by

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the Revised Statutes in cases of attachments against absent debtors. The sheriff did in fact return the inventory and appraisal to the clerk of the court in which the action was pending, who filed the same. If the sheriff was not mistaken in this (as to which I express no opinion), it was a mere irregularity in no way prejudicial to the defendants therein or the appellant, and cannot be permitted to prejudice the lien acquired by the respondents, by the seizure of the property. A question is made whether real estate is within section 35 of the Code, requiring the service of an attachment to be made upon property therein specified, by leaving a certified copy of the warrant of attachment with the persons specified in that section. If it is, no lien was created upon the house and lot under the attachment; no such service having ever been made. To determine this question reference should be had to the previous sections. Section 322 provides that the sheriff shall proceed therein in all respects in the manner required of him by law in case of attachment against absent debtors. Sections 7 and 8 (2 R. S.), do not require the service of any copy thereof upon persons in possession of such real estate. Section 234 enacts that the rights or shares which the defendant may have in the stock of any association or corporation, etc., shall be liable to be attached and levied upon and sold to satisfy the judgment and execution. Section 235 provides that the execution of the attachment upon any such rights or shares or any debts, or other property incapable of manual delivery to the sheriff, shall be made by leaving a certified copy of the warrant of attachment with the president, etc., or with the debtor or individual holding such property, with a notice, showing the property levied on. It is obvious that the framers of this section had in view only such property as the sheriff would be required to take possession of, were such possession capable of transfer to him. The possession of real estate might be transferred to him by the owner or occupant, and for this and the further reason that it was not designed to disturb the debtor in the possession of such property, it cannot be held to come within the meaning

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of the section. There is a good reason for the service of notice of the levy upon corporations, etc., in which the defendant may own stock or other interest; that is, the prevention of transfers being made. This has no application to real estate, as this may be conveyed discharged of the lien to *bona fide* purchasers unless such conveyance is prevented by filing a *lis pendens* pursuant to section 132 of the Code. The counsel for the appellant further insists that inasmuch as his judgment was docketed before the filing of the *lis pendens* as to the house and lot in question, he is a *bona fide* encumbrancer within the meaning of the section last referred to, and therefore his judgment is a lien prior to the attachment. But a judgment lien is not an encumbrance within the meaning of the section. A judgment is not a specific lien upon any particular real estate of the judgment debtor, but a general lien upon all his real estate, subject to all prior liens, either legal or equitable, irrespective of any knowledge of the judgment creditor as to the existence of such liens. There is no reason for holding that it was the intention of the section under consideration to change the law in this respect. The judgment appealed from must be affirmed with costs.

Chief Judge, ALLEN and ANDREWS, JJ., concur; PECKHAM, J., dissents; FOLGER, J., did not hear the argument; RAPALLO, J., did not vote.

Judgment affirmed.

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JOSEPH R. BASSETT, Respondent, v. PAUL N. SPOFFORD  
et al., Appellants.

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119 389

By the larcenous taking of chattels, the owner is not divested of his property, and a transfer to a *bona fide* purchaser does not impair his rights. The owner may follow and reclaim them wherever he can find them, and a carrier or other bailee can stand in no better situation than a purchaser who has received them in good faith and for full value. When the goods have been stolen, no question of negligence or estoppel of the owner thereby can arise.

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the Revised Statutes in cases of attachments against absent debtors. The sheriff did in fact return the inventory and appraisal to the clerk of the court in which the action was pending, who filed the same. If the sheriff was not mistaken in this (as to which I express no opinion), it was a mere irregularity in no way prejudicial to the defendants therein or the appellant, and cannot be permitted to prejudice the lien acquired by the respondents, by the seizure of the property. A question is made whether real estate is within section 35 of the Code, requiring the service of an attachment to be made upon property therein specified, by leaving a certified copy of the warrant of attachment with the persons specified in that section. If it is, no lien was created upon the house and lot under the attachment; no such service having ever been made. To determine this question reference should be had to the previous sections. Section 322 provides that the sheriff shall proceed therein in all respects in the manner required of him by law in case of attachment against absent debtors. Sections 7 and 8 (2 R. S.), do not require the service of any copy thereof upon persons in possession of such real estate. Section 234 enacts that the rights or shares which the defendant may have in the stock of any association or corporation, etc., shall be liable to be attached and levied upon and sold to satisfy the judgment and execution. Section 235 provides that the execution of the attachment upon any such rights or shares or any debts, or other property incapable of manual delivery to the sheriff, shall be made by leaving a certified copy of the warrant of attachment with the president, etc., or with the debtor or individual holding such property, with a notice, showing the property levied on. It is obvious that the framers of this section had in view only such property as the sheriff would be required to take possession of, were such possession capable of transfer to him. The possession of real estate might be transferred to him by the owner or occupant, and for this and the further reason that it was not designed to disturb the debtor in the possession of such property, it cannot be held to come within the meaning

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Chief Judge, ALLEN and ANDREWS, JJ., concur; PECKHAM, J., dissents; FOLGER, J., did not hear the argument; RAPALLO, J., did not vote.

Judgment affirmed.

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JOSEPH R. BASSETT, Respondent, v. PAUL N. SPOFFORD  
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45 387  
119 389

By the larcenous taking of chattels, the owner is not divested of his property, and a transfer to a *bona fide* purchaser does not impair his rights. The owner may follow and reclaim them wherever he can find them, and a carrier or other bailee can stand in no better situation than a purchaser who has received them in good faith and for full value. When the goods have been stolen, no question of negligence or estoppel of the owner thereby can arise.

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Where goods were sold by the plaintiff at Boston, to be delivered at New York, and paid for on delivery, and were forwarded, and the clerk of the plaintiffs being sent on to New York with the carriers' receipt, with instructions to deliver the goods on being paid for them; and the pretended purchaser having obtained from the clerk the receipt merely "for the purpose of examining the goods," and, by its means, got possession of the goods, removed them on board the defendant's steamer bound to Havana, and obtained from the defendant, before any notice to him of the fraud, bills of lading thereof,—*Held*, that the defendant was bound to deliver the goods to the plaintiff on demand, and on his refusal was liable for their value.

*Quere*, whether, if at the time of the demand, the goods had been loaded in the ship so as to be difficult of access, and their removal and delivery to the plaintiff would have caused expense, and necessarily delayed the voyage, and the defendant had offered to restore the goods on the return of the ship, these facts would have affected the question.

(Argued April 13th; decided April 25th, 1871.)

APPEAL from the General Term of the New York Common Pleas.

The action was replevin for four cases of shoes, which came to the possession of the defendant's testator from one Careras, to be carried and conveyed on steamer from New York to Havana, consigned to one Oliver. At the time the plaintiff, by his agent, notified the testator and the master and officers of the steamer of his claim, and demanded a delivery of the property, the cases were stowed in the hold of the vessel and difficult of access, and incapable of delivery, except with considerable labor and at some expense. The delivery would have delayed the departure of the vessel, which was about to commence her voyage. There was evidence tending to show that bills of lading for the property had been issued in the usual form, before any notice of the plaintiff's claim. The plaintiff claimed as owner. He was a resident of Boston, and contracted to sell four cases of shoes to Careras, to be delivered in New York, and paid for on delivery. The shoes were forwarded to New York by railroad and steamboat, the plaintiff taking a receipt for their carriage and giving the same to a clerk whom he sent with the goods to New York, with directions to deliver the goods to the purchaser

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on receiving the pay therefor. On his arrival in New York, the clerk called on Careras, and informed him of the arrival of the goods and that he was ready to deliver them on receipt of the purchase price. He was informed by Careras, that he would be prepared to pay at a later hour of the day, but as the clerk was leaving Careras remarked that he would like to examine the goods, and the bill of lading or receipt was given him "for the purpose of examining the goods." The clerk called at one o'clock, the time appointed, for the payment of the money, and was promised it at three o'clock of the same day. On calling at the last named hour, the payment was again deferred, and he then went to look after the goods and found they had been removed. They were traced to the testator's ship, to which they had been taken by Careras, and put on board for transportation to Havana, consigned to one Oliver. The plaintiff demanded his goods, and upon their non-delivery this action was brought.

At the close of the trial the plaintiff asked the court to direct a verdict for the plaintiff, on the grounds: 1st. That the goods were feloniously obtained by Careras, and 2d. That there was no evidence of a delivery of the bill of lading, and a verdict was ordered as requested, to which the defendant excepted. The judgment entered upon the verdict was affirmed by the General Term of the Common Pleas of New York city, and from the latter judgment the defendant has appealed to this court.

*Erastus Cooke*, for the appellants. The defendants received the goods in the ordinary course of business; they had shipped the goods and were *bona fide* purchasers within the definition of *Root v. French* (113 Wend., 572). The carrier represents the rights of the consignee. (*Fitzhugh v. Winan*, 9 N. Y., 562.) The delivery of the bill of lading was a symbolical delivery of the goods. (*Dows v. Greene*, 24 N. Y., 643, 644; *Lukbaum v. Mason*, 2 T. R., 63, 1 Smith's L. Cas., 848.) A party who buys or makes advances *bona fide* on the faith of an indorsement of a bill of lading, by a

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fraudulent vendee, will acquire a good title against the original vendor. (*Dows v. Rush*, 28 Barb., 157; *Dows v. Greene*, 32 Barb., 493; *Keyser v. Harbeck*, 3 Duer., 391; *Rowley v. Biglow*, 12 Pick., 387.

*Richard O'Gorman*, for the respondent. To constitute a delivery there must not only be the act itself necessary to effect it, but, to render it available, it must be an intentional act; must receive the assent of the mind that it is done for that purpose. (*Lester v. McDowell*, 18 Penn., 91.) The owner can follow his stolen property, and recover it in the hands of any person, however innocent. (*Saltus v. Everett*, 20 Wend., 282.)

When property is pledged without authority from the owner, the pledgee has no lien against the owner. (*Duell v. Cadlipp*, 1 Hill, 166; *Cheeseman v. Excell*, 4 Law. & Eq., 438.) A *bona fide* vendor of stolen goods can give no title, and trover may be brought against the purchaser without a demand and refusal. (*Rogers v. Hine*, 1 Cali., 427; *Lee v. Robinson*, 37 Law. & Eq., 406; *Curtis v. Crane*, 32 Vermont, 232; *Newkirk v. Dalton*, 17 Ill., 413.) The same rule exists as to sales by bailee at will. (*Baily v. Colby*, 34 N. Y., 29; *Lovejoy v. Jones*, 10 Foster, 161; *Crocker v. Gullifer*, 44 Maine, 491.) Unauthorized sales by carrier. (*Bailey v. Shaw*, 4 Foster, 297; *Saltus v. Everett*, 20 Wend., 267; *Blossom v. Champion*, 37 Barb., 554; S. C. 28 Barb., 217.) If this was a conditional sale, vendee could not give title against the original owner. (*Herring v. Hoppock*, 15 N. Y., 409; *Herring v. Willard*, 5 Sand, 418; *Whipple v. Gilpatrick*, 1 Appleton, 427.) On a cash sale, payment and delivery are simultaneous acts, and title to the property does not pass until payment, unless waived; and no evidence of waiver is shown. (*Chapman v. Lathrop*, 6 Cow., 610; *Convey v. Bush*, 4 Barb., 564; *Levin v. Smith*, 1 Denio, 571; *Mowry v. Walsh*, 8 Cow., 242; *Smith v. Lynes*, 1 Seld., 41.) The plaintiff need not tender a bond of indemnity. (*Thompson v. Trail*, 6 B. & C. (13 E. C. L. R.), 36; *Stevens v. Bost R.*



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*R. Co.*, 8 Gray, 262.) The pendency of the replevin suit was a complete defence to any claim by the shipper, against the carrier. (*States v. Davis*, 1 Black., 101; *Van Winkle v. N. J. Mail Steam Ship Co.*, 37 Barb., 122; *Wilson v. Anderson*, 1 B. & Adolph, 122; 2 Hilliard on Torts (1st ed.) 248, 254.)

ALLEN, J. By the larcenous taking of chattels the owner is not divested of his property, and a transfer to a purchaser does not impair the right of the true owner. A purchase of stolen goods either directly from the thief or from any other person, although in the ordinary course of trade and in good faith, will not give a title as against the owner. In the case of a felonious taking of goods, the owner may follow and reclaim them wherever he may find them. A carrier or other bailee can stand in no better situation than a purchaser who has received them in good faith on a purchase for their full value.

A larceny has been defined as "the felonious taking the property of another, without his consent and against his will, with intent to convert it to the use of the taker" (*Hammond's Case*, 2 Leach, 1089), or "the wrongful or fraudulent taking and carrying away by any person of the personal goods of another, with a felonious intent to convert them to his (the taker's) own use and make them his own property without the consent of the owner." (2 East, P. C., 553; 2 Russ on Crimes, 1; *Mowrey v. Walsh*, 8 Cow., 238.)

The fraudulent and wrongful taking being proved with the felonious intent, the *animo furandi*, the only question remaining in any case is whether the taking was with the consent of the owner; for if so, although the consent was obtained by gross fraud, there is no larceny. But the consent must be to part with the property, and not the naked possession for a special purpose. If the owner does not intend or consent to part with his property, then the taking and conversion of it with a felonious intent by one having possession of it, as the property of the owner and for a special purpose is larceny. If it

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appear that although there is a delivery by the owner in fact, yet there is no change of property nor of legal possession, but the legal possession still remains exclusively in the owner, larceny may be committed as if no such delivery had been made. (*Mowrey v. Walsh*, *supra*, and cases cited; and 2 Russ. on Crimes, 22; *Lewis v. Commonwealth*, 15 S. & R., 93; *Commonwealth v. James*, 1 Pick., 375; *Cary v. Hotaling*, 1 Hill, 311.) The general owner of personal property holds the constructive possession and may maintain trespass, though the actual possession be in another; and one who obtains the bailment of goods, or the possession for a special purpose, fraudulently intending to deprive the owner of his property, may be convicted of larceny. But if the owner intends to part with the property and delivers the possession, there can be no larceny, although fraudulent means have been used to induce him to part with the goods. The delivery of the receipt to Careras was to enable him to examine the goods before paying for them, and for no other purpose; and with the consent of the plaintiff he had access to, and possession of the goods for this special purpose. The sale of the goods was for cash, to be paid on delivery; the condition was never waived, and there was no absolute delivery of the goods or of the receipt for them with intent to part with the property, except upon the payment of the purchase-price. Had the ship owner received from Careras the original receipt or bill of lading for the goods, and dealt with him on the faith of it, as evidence of ownership, a different question might have arisen. But Careras had availed himself of that document to possess himself of the property, which he took and removed from its place of deposit to the ship of the defendant's testator. Careras had the naked possession of stolen property, and the ship owner was not misled or induced to receive it by the production of any other evidence of ownership. Neither did any question arise upon the trial as to the effect, upon the right of the plaintiff to demand an immediate delivery, of the fact that the goods were stored in the hold of the vessel under other goods, and that a breaking up of the cargo

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would cause delay and expense, and that the officers of the vessel offered to deliver the goods to the owner on the return of the ship from Havana.

There was no conflict of evidence, nor any question to submit, as to the felonious taking of the goods, to the jury.

The plaintiff being clearly entitled to a verdict, upon the ground that the goods had been feloniously stolen and taken from him, the other questions made were wholly immaterial. The actual delivery of a bill of lading to the shipper by the testator would have given him no better right to retain the goods for his indemnity than a purchaser in good faith and for value would have done. Neither could acquire any right to withhold stolen property from the plaintiff, the rightful owner.

The goods having been stolen, there was no question of negligence or estoppel in the case. A party whose horse is stolen may pursue and reclaim his property, although he has negligently left his stable unlocked.

The question of estoppel would have arisen, if the ship-owner had had knowledge of, and acted on, the faith of the original shipping receipt, delivered to Careras.

The delivery of the goods for the purpose named, although it enabled Careras to perpetrate a fraud upon the defendant's testator, did not divest the plaintiff of his title or estop him from reclaiming them wherever found.

The judgment must be affirmed.

All concur except GROVER, J., not voting.

Judgment affirmed.

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THE COMMERCIAL WAREHOUSE COMPANY OF NEW YORK,  
Appellant, v. JOHN S. GRABER, Respondent.

Where a third person, under the 197th section of the Code, deposits money with the sheriff, in order that the defendant may be released from arrest, if the plaintiff obtains judgment before bail have justified, he becomes absolutely entitled to an application of the money to the satisfaction of his judgment. But the claim of a plaintiff, thus seeking to have the property of a third person applied to the satisfaction of the defendant's debt, is

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*strictissimi juris*. It should be clearly established by proof, and no intentions will be indulged in its favor.

Accordingly, where, after bail have been accepted by the deputy sheriff, and, at the request of the deputy, a third person deposits in his hands a sum of money as security to such deputy that the sureties will justify or the defendant surrender himself.—*Held*, that the plaintiff could not have money so deposited applied to his judgment. (PECKHAM and ANDREWS, JJ., *contra*.)

(Argued April 11th; decided April 25th, 1871.)

APPEAL from an order of the General Term of the Superior Court of the city of New York, affirming an order at Special Term (SPENCER, J.), denying a motion made by the plaintiff, that the sheriff pay into court \$1,500, received by him on the arrest of the defendant.

The facts are sufficiently stated in the opinion.

*Francis H. Dykers*, for the appellant. In this case, the \$1,500 taken by the sheriff was a security recognized by law as one which the sheriff might take, and was taken, in the manner provided by law, and was not void. (*Acker v. Burrall*, 21 Wend., 607; *S. C.*, 23 id., 607.) The fact that the deposit was made by a third person is the same as if it were made by the defendant. (*Hermann v. Aaronson*, 3 Abb., N. S., 389; *S. C.*, 8 id., 155.) It was deposited for the defendant; and, on the strength of such deposit, he was set at liberty. (*Salter v. Weiner*, 6 Abb., 191.)

*A. J. Vanderpoel*, for the respondent.

RAPALLO, J. The 197th section of the Code provides that the defendant may, at the time of his arrest, instead of giving bail, deposit with the sheriff the amount mentioned in the order; that the sheriff shall thereupon give the defendant a certificate of the deposit, and the defendant shall be discharged from custody. By section 198 the sheriff is required to pay into court moneys so deposited. At any time before judgment, the defendant may obtain a return of the money by giving bail and causing them to justify. But if the money

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remains on deposit at the time of the entry of judgment, the plaintiff is entitled to have it applied to the satisfaction of the judgment.

It has been held, under a similar statute in England, that a surrender of the defendant, after judgment, will not relieve money thus deposited, even though it be the money of a third party; and that if the plaintiff obtains judgment before bail have justified, he becomes absolutely entitled to an application of the money. (*Bull v. Turner*, 1 Tyrr. & Gra., 367); and to the same effect is the case of *Herman v. Aaronson* (3 Abb. N. S., 392), and *S. C.* (8 Abb. N. S., 155).

Where the money deposited in fact belongs to the defendant, there is no injustice or hardship in thus laying hold of it; but where it is deposited by a third party, in lieu of giving a bond, it is more harsh in its operation than the rules ordinarily applied to bail. It is the policy of the law to favor bail, and they are generally permitted, after judgment against their principal, and even after suit brought against themselves, to surrender their principal in their own exoneration. This case seems to be an exception to the general rule, and the statute, as hitherto construed, affords no similar relief to the surety who pledges his property instead of his name, to obtain the release of his principal from arrest. The claim of a plaintiff, thus seeking to have the property of a third party applied to the satisfaction of the defendant's debt, is *strictissimi juris*. It should be clearly established by proof, and there is no just reason for indulging in any intendments in its favor.

In the present case the plaintiff has obtained all the legitimate advantages of the arrest as a provisional remedy. The defendant has been surrendered, and has given bail for the limits. Still, if the plaintiff has, by strict law, become entitled to appropriate the money of Alexander, his right must be enforced.

The question presented by the papers on this appeal, and upon the determination of which the plaintiff's right to the order moved for depends, is whether the money in ques-

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tion was in fact deposited in lieu of bail, pursuant to the 197th section.

The affidavit upon which the motion was founded states that when the defendant was arrested, he offered to the sheriff a bail bond, which the sheriff refused to accept, and that thereupon the sum of \$1,500 was deposited with the sheriff by the defendant, or some one in his behalf, through Magnus Alexander.

This statement is flatly contradicted by Alexander, and the deputy sheriff who made the arrest. Alexander deposes, that the defendant was a workman in his employment; that the deponent and another person became bail and the sheriff accepted the bail; that afterward deponent was requested to appear and justify; that he lent no money to the defendant to deposit as bail, and did not deposit any money for bail, but at the request of the deputy sheriff placed \$1,500 in his hands as security to him, that the sureties would justify, or the defendant surrender himself. It being expressly explained to him that the money was in no jeopardy, if the sureties justified, or the defendant delivered himself up.

Bancker, the deputy sheriff, deposes, that he never declined to accept the bail bond executed on the arrest; that, on the contrary, he did accept it, and upon accepting it, released the defendant from custody. He expressly states that the \$1,500 was not intended as a deposit in lieu of bail; that he had already taken bail, and that the money was taken by him to protect himself against liability to the sheriff in case of the failure of the bail to justify. He further states, that a copy of the undertaking was served on the plaintiff's attorney, and afterward notice of justification was given; that one of the bail justified, and as to the other the justification was adjourned to the 27th of January, at which time the plaintiff's attorney refused to proceed with the justification, having, as he claimed, entered judgment in the action. On the same day the defendant was surrendered.

Alexander states in his affidavit, that after he had justified, the examination, as to the other bail, was adjourned at the

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request of the plaintiff's attorney ; and at the adjourned day, the latter objected to proceeding, on the ground that he had, since the last adjournment, entered judgment against the defendant. This statement is uncontradicted.

It must be assumed that in denying the motion at Special Term, the judge adopted the statements of fact contained in the opposing affidavits. His decision was affirmed at the General Term, and decisions upon questions of fact are not usually reviewed in this court. If the facts stated in the opposing affidavits are sufficient to warrant a denial of the motion, the order should be affirmed.

The deputy sheriff states distinctly, that he accepted the bail, and on accepting it, discharged the defendant from custody; that this was done before the money was deposited appears from his statement, that when he received the money he had already taken bail. He clearly had no right to take the money after taking bail. The 197th section only allows the taking of the deposit, instead of bail. Bail may be put in after the deposit, to procure the release of the money, but there is no authority for taking money after bail has been received, and in addition thereto. However extraordinary the proceedings of the officer may appear, we will not, for that reason, and in the face of the positive statements in the opposing affidavits, disturb the decision of the court below upon the facts, and speculate as to probabilities. That an officer should exact a security to which he was not entitled, and that a party should submit to the exaction, are not beyond the range of possibility. Here, the officer and party both testify to the fact, and they are corroborated by the circumstances, that the money did not take the course usual with deposits in lieu of bail; that the deposit was not reported to the sheriff's office, and that it does not appear that any certificate of deposit was given as required by the Code.

The denial of the motion should be sustained, on the ground that there was evidence that the money was not deposited under section 197, and that the court below must be deemed to have so found.

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Chief Judge, and GROVER and FOLGER, JJ., concur; PECKHAM and ANDREWS, JJ., dissent; ALLEN, J., does not vote.  
Order affirmed with costs.

ELNATHAN L. SANDERSON, Respondent, v. WILLIAM CALDWELL and HORACE P. WHITNEY, Appellants.

If the application or meaning of the words in an alleged libel is ambiguous, or the sense in which they were used is uncertain, and they are capable of a construction which would make them actionable, although, at the same time, an innocent sense can be attributed to them, it is for the jury to determine, upon all the circumstances, whether they were applied to the plaintiff, and in what sense they were used.

In an action for libel, it is unnecessary for the plaintiff to prove affirmatively that he sustained damage in consequence of the libelous publication. The law not only imputes malice to the defendant, but presumes that damages have been sustained by the plaintiff in consequence of the unlawful act of the defendant.

In libel or slander, the plaintiff cannot, by innuendoes, extend the meaning of the words beyond what is justified by the words themselves, and the extrinsic facts with which they are connected.

In slander, where the words used have such a relation to the profession or occupation of the plaintiff that they directly tend to injure him in respect to it, or to impair confidence in his character or ability, when, from the nature of his business, great confidence must necessarily be reposed, they are actionable although not applied by the speaker to the profession or occupation of the plaintiff. When, however, they convey only a general imputation upon his character, equally injurious to any one of whom they might be spoken, they are not actionable, unless such application is made.

But, in an action for libel, the fact that the words used had reference to the profession or business of the plaintiff is not the substantive ground of the action; the actionable quality of the words used does not, in any case, depend upon that consideration.

(Argued April 10th; decided April 25th, 1871.)

APPEAL from a judgment of the late General Term of the second judicial district, affirming a judgment upon a verdict at the circuit in the county of Kings, rendered on the 8th day of February, 1869, in favor of the plaintiff. The judgment was for \$5,000.

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| 162 | 160 |



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This action was for a libel published by the defendants in the Sunday Mercury.

The plaintiff was a lawyer, practicing in Brooklyn, and was also a candidate for member of Assembly; the libelous article was published two days before election, and was as follows: "Elnathan L. Sanderson, extra-radical candidate for Assembly from the third, fourth and eleventh wards of Brooklyn, did a good thing, in his sober moments, in the way of collecting soldiers' claims against the government, for a fearful per centage. The blood-money he got from the 'boys in blue,' in this way, is supposed to be a big thing, and may elect him to the Assembly on the 'loyal' ticket, although the soldiers and sailors are out in full force against him." The complaint alleged that the meaning of this article, was to charge the plaintiff with being in the habit of the use of spirituous liquors to excess, or to intoxication, and to such a degree, as to disqualify him from the transaction of his professional business, and of improperly, dishonestly and fraudulently obtaining money of and from the soldiers and sailors of his district; and, also, to charge the plaintiff with taking advantage of the soldiers and sailors in his professional capacity as a lawyer, and in making unfair, unreasonable and extortionate charges against them for professional services. He also claimed that he was a candidate for office, and that he was greatly injured in his professional business. Claim \$20,000. No proof of loss, damage or injury to the plaintiff, professional or otherwise, was given. No proof of actual malice was made.

The defendants moved for a dismissal of the complaint, on the ground that the article was not libelous *per se*. At the close of the evidence, the defendants requested the court to charge, that no damages could be given by the jury for injury to the plaintiff in his professional capacity, there being no proof of any such damage. That under the proofs, the jury had no right to give punitive or vindictive damages. That the defendants had a right to oppose the election of the plaintiff, and advocate the election of any other person to the

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office which the plaintiff sought, and criticise his acts. That upon the proof, the jury might find a verdict for mere nominal damages, and that such verdict would be a vindication of the plaintiff. All of which the court refused, and defendants duly excepted. The court charged, that it was for the jury to determine whether the article sued on, contained the charges which it is alleged by the plaintiff it does, against him, and this was duly excepted to. Defendants' counsel objected to the drawing of the jury, on the ground that there should be, at least, twenty-four names in the box from which to draw, a panel then being out in another case. Before the drawing of the jury was completed, the other jury came in and rendered a verdict. The defendants then moved that the names of those twelve be put in the box, and those already drawn on this jury, and that, from the whole, a jury be drawn. This was refused.

*Samuel Hand*, for the appellant.

*George G. Reynolds*, for the respondents. The article was clearly actionable. (*Webster v. Foster*, 11 Barb., 203; 6 Barb., 614.) It was not a privileged communication. (*King v. Root*, 4 Wend., 113.) Malice is inferable. (4 Wend., 113.) A want of professional integrity is imputed, and the words are actionable. (*Garr v. Selden*, 6 Barb., 416; reversed in effect, but on other grounds, in 4 Cow., 91.) A "high misdemeanor" is charged. (No. 12, U. S. Stat., p. 568, §§ 6, 7; No. 13 id., §§ 12, 13.) Words are to be taken in their natural meaning. (*Wright v. Paige*, 36 Barb., 438; 33 Barb., 615.) In the matter of the objection to the jury, see 3 Seld., 451; 6 Wend., 549; 7 Cow., 382; 7 Wend., 422; 6 Cow., 584. Imputing want of integrity to a professional man is actionable *per se*. (6 Barb., 416; 13 Abb., 41, *et seq.*) Where a trial and general verdict have been had, the Court of Appeals can only deal with questions of law, upon exceptions duly taken, and cannot correct the errors of the jury. (14 N. Y., 310, 319, 321; 23 N. Y., 343; 30 N. Y., 319, 324;

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31 N. Y., 50; 34 How., 254.) Actual damage is not necessary to sustain a verdict for exemplary damages. (4 Duer, 247; 9 Abb., 45.)

ANDREWS, J. The court properly refused to instruct the jury that the article published by the defendant was not libelous. That instruction would only have been proper in case it was incapable of a construction injurious to the plaintiff.

In an action for defamation, if the application or meaning of the words is ambiguous, or the sense in which they were used is uncertain, and they are capable of a construction which would make them actionable, although at the same time an innocent sense can be attributed to them, it is for the jury to determine upon all the circumstances, whether they were applied to the plaintiff, and in what sense they were used.

The publisher of a libel cannot escape liability by veiling a calumny under artful or ambiguous phrases, or by indirectly charging that which would be slanderous, if imputed in direct and undisguised language.

The language of the publication in this case, if capable of an innocent construction, is also clearly capable of a construction which would make it libelous.

To say of one, that in his sober moments he collected soldiers' claims against the government at a fearful per centage, is, or at least may be, equivalent to a charge of drunkenness, and of unjust and extortionate conduct in the prosecution of his business.

If the words "sober moments," in connection with the context, referring to the plaintiff as an "extra radical candidate" for the Assembly, could have been construed in an innocent sense, it was for the jury to ascertain the real sense in which they were used; and the jury having found for the plaintiff, the defendants are concluded from now alleging that the meaning they attributed to them was the true one.

It does not need the citation of authorities to show, that written words, charging another with being a drunkard and with extortionate charges for his services, are libelous.

They tend to degrade him in the estimation of the community, to deprive him of public confidence and the temporal advantages which naturally result from a reputation for honesty and sobriety.

The principal question in this case arises upon the instruction of the court to the jury, that it was a question of fact for them to determine whether the article for the publication, of which the action was brought, contained the charges which the plaintiff in his complaint alleged it contained against him. To this instruction the counsel for the defendants excepted.

The complaint, after averring that the plaintiff at the time of the publication complained of, was a practicing lawyer and a resident of Brooklyn, and after setting out the alleged libelous article, and the fact of its publication in the newspaper of the defendants in the city of New York, and making other averments not now material to be noticed, proceeds as follows: "That said defendants, in said libel referred to, meant the plaintiff in this action, and did by said libel charge and intend to charge the plaintiff with being in the habit of the use of spirituous liquors to excess or to intoxication, and to such a degree as to disqualify him for the proper transaction of his professional business, and of improperly, dishonestly and fraudulently obtaining money of and from the soldiers and sailors of his district, the 'boys in blue;' and did also in and by said libel charge and intend to charge the plaintiff with taking advantage of the soldiers and sailors in his professional capacity as a lawyer, and in making unfair, unreasonable and extortionate charges against them for professional services, and with compelling them to pay such charges."

The part of the charge of the court, to which we have referred, relates to the part of the complaint above quoted, and to sustain it the libel proved must, by its language alone or in connection with extrinsic facts proved, which lawfully

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could be considered by the jury, have authorized the meaning to be attributed to it, alleged by the plaintiff.

It was unnecessary for the plaintiff, in order to sustain his action, to prove affirmatively that any damages were sustained by him in consequence of the libelous publication.

It would be quite impossible for a person whose character had been assailed by slanderous words to follow them and establish by proof all the injurious consequences, although it might be quite certain that injury had been sustained, which was not capable of definite proof.

The law, therefore, when the publication of the libel has been shown, not only imputes malice to the defendant, but presumes that damages have been sustained by the plaintiff in consequence of the unlawful act of the defendant.

But the plaintiff need not rest upon the inference and presumption of law in his favor, but he may show, with a view to enhance the damages, that the defendant in fact was governed in making the publication by an evil and malicious intent, and that particular damages, the natural proximate result of the publication, resulted from it.

Considering the language of the libel in connection with the extrinsic fact proved, that the plaintiff was at the time a lawyer engaged in the practice of his profession, it is a just inference that the words used related to him in his professional character. The plaintiff is spoken of as collecting claims of soldiers and sailors against the government.

Whether the collection of such claims is confined to lawyers, or whether some members of that profession decline to engage in that business, is immaterial, if, when undertaken by a lawyer, it is legitimate professional business, and imposes upon him the obligations of professional duty; and that such is the character of the business when undertaken by a lawyer, is not, we think, open to doubt.

The meaning of the words in an action of slander or libel cannot be extended by an innuendo beyond what is justified by the language and the extrinsic facts with which they are connected.

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The charge against the plaintiff that he did a good thing in collecting soldiers' and sailors' claims against the government at a fearful per centage, and that the "blood money" he got in this way was supposed to be a "big thing," in connection with the fact that he was a lawyer, may fairly be construed as imputing to him unjust, dishonest and extortionate conduct in his professional capacity, and justifies the meaning attributed to it in the complaint.

The charge, that in his "sober moments" he prosecuted his business, authorized the inference that he was in the habit of the immoderate use of intoxicating liquors; and the natural tendency and result of such a habit, in a person engaged in any business, and especially in professional business, is to unfit him for the proper discharge of it.

The defendants, in judgment of law, intended to charge what their language implied, and to produce the injury which was the natural and proximate result of their act.

They may not, in fact, have had in mind the particular meaning charged by the plaintiff, or intended the special injury produced; but the law, for remedial purposes, adjudges that a wrongdoer intends all the natural and proximate consequences of the wrong, and administers punishment and allows compensation upon this presumption.

It is claimed, however, that special damages could not be recovered in this case for injury sustained by the plaintiff in his professional character, for the reason that the libel does not state or imply that the plaintiff was a lawyer, and, therefore, does not relate to him in that character; and for the additional reason that no actual damages to him in his profession were proved.

It is said by Chief Baron COMYN, that "words, not actionable in themselves, are not actionable when spoken of one in an office, profession or trade, unless they touch him in his office, profession," etc. (Action on the case for defamation, D, 27.)

In general, words of mere opprobrium, or charging general immorality not amounting to crime, are not actionable *per se*,

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Opinion of the Court, per ANDREWS, J.

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and the rule cited states the exception which has been uniformly recognized ; but there is some confusion in the cases upon the point whether the words used must, in terms, be applied by the speaker to the office, business or profession of the person who claims to recover by reason of them, and whether, if not so expressly applied, they can be said to touch him in the special character named.

The rule derived from the authorities, and with which most of the cases can be reconciled, seems to be this : When the words spoken have such a relation to the profession or occupation of the plaintiff that they directly tend to injure him in respect to it, or to impair confidence in his character or ability, when, from the nature of the business, great confidence must necessarily be reposed, they are actionable, although not applied by the speaker to the profession or occupation of the plaintiff ; but when they convey only a general imputation upon his character, equally injurious to any one of whom they might be spoken, they are not actionable, unless such application be made. (*Cawdry v. Higley*, Cro. Ca., 270 ; *Chaddock v. Briggs*, 13 Mass., 248 ; *Davis v. Ruff*, Cheves's Rep., 17 ; *Ayre v. Craven*, 2 Ad. & El., 2 ; *Dorley v. Roberts*, 8 Bing. N. C., 835 ; *Jones v. Little*, 7 Mees. & Wels., 423 ; *Starkie on Slander*, 118 ; 1 New Lead. Cas., 124.)

Within the rule stated, if the slander had been verbal, instead of written, the plaintiff would have been entitled to recover damages for the injury sustained by him in his profession.

But the publication was libelous *per se*, without reference to the professional character of the plaintiff ; and no authority has been cited, or has come to our notice, holding that the plaintiff cannot, in such a case, by extrinsic evidence, connect the libelous words with his professional character, and recover the natural and proximate damages to him, in his profession, resulting therefrom.

In an action for libel, the fact, that the words used had reference to the profession or business of the plaintiff, is not the substantive ground of the action. The actionable quality

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Statement of case.

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of the words used does not, in any case, depend upon that consideration.

We are of opinion that the plaintiff was entitled to recover for damages to him in his profession by reason of the libel, and that the jury could award such damages, without specific proof in respect to them.

The exception to the refusal of the court to charge as requested by the counsel for the defendants, that there being no proofs of malice beyond that which is implied from the publication of the article, the jury might find a verdict for nominal damages, and that such a verdict would be a vindication, was not well taken. The plaintiff did not attempt to justify the libel, nor were there any circumstances mitigating it, unless the fact that the plaintiff at the time was a candidate for office, may be considered in the nature of mitigation. The plaintiff was entitled to be compensated for the injury to his reputation, caused by the wrongful publication. His character was not impeached. In such a case, a nominal verdict would have been a denial of justice, and the court was not bound to assent to the suggestion of the defendant that such a verdict might be given. Nor would such a verdict have been a vindication of the plaintiff. It would have established that the charges were false, but at the same time it would have left it to be inferred that the plaintiff had no character to lose.

We see no error in the manner of impaneling the jury. The judgment should be affirmed, with costs.

All concurring, judgment affirmed.

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LUTHER C. SPENCER, Appellant v. MARY ANN CARR et al,  
Respondents.

The parents of an infant of six years, made and executed a quit claim deed of certain real estate to her, which was recorded. Subsequently, the parents executed a deed of the same property in trust to the appellant, under which trust he made large advances of money. The mother's name was signed to this deed by the infant (then being about sixteen



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years of age), at the request of the mother.—*Held*, that, in the absence of intentional fraud upon her part, the infant would not be estopped by this act from claiming title under her previous deed. (Ch. J., and ALLEN, J., *contra*.)

In the case of a grantee only six years of age, where the grant is beneficial, an acceptance of the deed will be presumed.

(Argued April 20th; decided April 28th, 1871.)

APPEAL from the judgment of the late General Term of the Supreme Court, in the seventh district, affirming the judgment of the Special Term in favor of the defendant.

On the 19th day of July, 1856, Mary Ann Carr was the owner of certain real estate, and on the same day, together with her husband, made and executed a mortgage on the same. The same premises were, November, 1856, by deed, duly recorded, conveyed by the defendants, Mary Ann Carr and her husband, to the infant defendant, Henrietta, then being about six years of age. On or about the 28th day of January, 1867, the said Mary Ann Carr and her husband, executed a deed of the same premises together with other real estate to which they had title, to the plaintiff, in trust, the latter executing back a declaration of trust. Under this trust the plaintiff made large advances of money, and also paid the outstanding mortgage on the premises. Mary Ann Carr's name to this deed was signed, at her request, by the infant defendant, then about sixteen years of age. She, at the time, did not remember the conveyance to her. After all the advances had been made, and the plaintiff had proceeded to close up his trusts, and not before, the fact of the conveyance to her was recalled to her recollection. This action was brought to have her barred from claiming the premises, or that they be sold, and plaintiff's advances repaid him. The court found in favor of the plaintiff, so far as to cancel the discharge of the mortgage, and declare a foreclosure of the same, decreed that the deed of the minor had priority to his conveyance.

*James C. Cochrane*, for the appellant.

*Charles S. Baker*, for the respondent.

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Opinion of the Court, per PECKHAM, J.

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By the Court—PECKHAM, J. It is urged that the infant, Henrietta, under the facts of this case, conveyed her interest in the property, when she signed the name of her mother to the deed, to the plaintiff. The deed was executed by her father and mother, and conveyed, and assumed to convey, only their interest in the premises.

It is insisted that this was a fraud upon the plaintiff, practiced by Henrietta, and that in equity, her rights are made subject to the plaintiff. In other words, that she is estopped, by reason of her fraud, from setting up her title as against the plaintiff's claim.

If one obtain money or aid in obtaining it, by falsely representing that another has title to land, when he knows to the contrary, when in fact he, himself, has the title, he will be estopped from setting up his title as against the lender.

The same sound rule of equity is applied to a prior encumbrancer, who witnesses a second encumbrance, knowing its contents, and intentionally suffers the second mortgagee to act in ignorance of the prior mortgage; he is thereby auxiliary to an act of fraud. (*Brinckerhoff v. Lansing*, 4 J. C. R., 70; *Lee v. Porter*, 5 id., 272; Fonbl. Eq., 163.)

Fonblanque says: "When a man has a title, and knows of it, stands by and either encourages or does not forbid the purchase, he shall be bound, and all claiming under him; neither shall infancy or coverture be any excuse in such case."

A case is reported in 2 Eq. Ca. Ab., 488, where an infant, over seventeen years of age, had received the full consideration for a lease assigned by his guardian, and afterward sought to avoid it, and demised the lands to another, yet equity compelled him to execute the lease or pay back the money, KING, Chancellor, holding, that infants had no privilege to cheat.

Another case of fraud was by an infant, then about twenty years of age, who was employed by his father to raise money upon land, which the father claimed to own in fee, free from encumbrance, and made affidavit to that effect. The money was obtained, and the infant was active in procuring it and

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witnessed the mortgage. After his father's death, the infant set up, as the fact was, that he had a remainder in the land after his father's death, which was all the time known to him, and insisted that the mortgage was not valid against him. The lord chancellor overruled the defence, holding that if an infant be old and cunning enough to contrive and carry on a fraud, in equity, he ought to make satisfaction for it. (2 Eq. Ca., Ab., 515.) See, also, *Savage v. Foster* (9 Mod., 35), where the same doctrine is recognized as to a covert, and sustained by the conceded rule applicable to infants. This was the case of a purchase of land by a third person, to which she had a title, and which she did not make known, but concealed.

In *Becket v. Cordley* (1 Br. C. R., 353), Lord Chancellor THURLOW recognizes the rule as applicable to infants, where the infant was a party to the fraud; but he very properly repudiates the idea that merely witnessing the second conveyance by the infant is evidence of his knowledge of its contents. (See, also, 1 Story Eq. Jur., §§ 385, 385a and 386; *Bright v. Boyd*, 1 Story's Rep., 478, 493.)

In most of these cases in reference to infants, the rule is laid down that the infants should be of sufficient age to appreciate their rights and duties. On this subject Chancellor KENT makes some sound observations. (2 Kent, 240, 241, and cases cited.)

The claim of the counsel for the plaintiff is based on the alleged fraud of the defendant. The difficulty is, that no fraud in the infant is found by the trial justice; but her innocence and freedom from fraud are found. We have no power to question this finding, if it were open to question as having no evidence to sustain it, as the testimony is not contained in the record. I should be entirely indisposed to listen to such an excuse from an adult, as that he had forgotten his title; but the facts of this case make it quite rational that she then had no recollection or even knowledge of this deed.

It is also insisted that the plaintiff ought to be allowed the amount paid by the father of the infant upon the mortgage,

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after his grant of land to the infant. An answer to this is that no such fact is found. *He* may have paid money thereon, but as it is not found that he did, or who paid it, or when, it is unimportant to discuss the law of such a case.

It is also urged that there was no acceptance of the deed by the infant; but this is contrary to the finding that the deed was delivered. A delivery cannot take place without an acceptance. (*Jackson v. Phipps*, 12 J. R., 418.) Besides an acceptance will be presumed from the beneficial nature of the grant. (*Jackson v. Bodle*, 20 J. R., 184.)

A delivery is found, and no presumption can be entertained to reverse a judgment. No fraud is found against the infant; none can be presumed from the facts found; hence there is no ground for depriving her of her legal rights.

Judgment affirmed, without costs in this court.

GROVER, FOLGER, RAPALLO and ANDREWS, JJ., concur; Chief Judge and ALLEN, J., dissent.

Judgment affirmed. ✓

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THE NATIONAL UNION BANK OF WATERTOWN, Respondent, v.  
HORACE LANDON et al., Appellant.

Where stockholders in a manufacturing corporation, upon the expiration of its charter, agree to continue the business, and appoint one of their own members as agent with managing powers, and further agree to furnish money, when called upon by such agent, to carry on the business, in proportion to the amount of stock held by each in the old corporation,—*Held*, that they all became liable as partners as to third persons, and for debts contracted by such agent in carrying on the business, on the ground that he had the power as partner to bind the others. And when commercial paper, for the benefit of the firm, was made by such agent, signing the name of the old corporation, by himself, as agent,—*Held*, that all the members of the association are liable upon such paper to its full amount, it appearing that it was understood that the business was to be carried on in the name used in signing the note.

*It seems* that the fact that the plaintiff, when he took the note, supposed it was a note of the corporation, and was ignorant of its dissolution, does not affect the question of liability.

(Argued April 20th; decided April 25th, 1871.)

## Statement of case.

APPEAL from a judgment of the late General Term of the Supreme Court, in the fifth judicial district, affirming judgment for the plaintiff on the report of a referee.

Action upon a note made by "Redwood Iron Manufacturing Company by S. C. Sardam, agent," payable to order of M. W. White for \$10,000, and indorsed by White. The other facts are sufficiently stated in the opinion of the court.

*John H. Reynolds*, for the appellant. An erroneous legal conclusion from the facts proved entitles the appellant to a reversal of the judgment. (*Mead v. Bunn*, 32 N. Y., 279.) Upon any reasonable construction of the agreement, Sardam had no power to make the note. (1 Story on Agency, §§ 62, 68, 69, and cases cited in notes; *Hubbard v. Elmer*, 7 Wend., 446; *Rossiter v. Rossiter*, 8 Wend., 494; *Hantangen v. Brown*, 7 M. & W., 595; *Fenera v. Depew*, 17 How., 418; *Mills v. Carnly*, 1 Bosw., 159; *Brisbane v. Adams*, 2 Coms., 129; *Union Bank v. Mott*, 39 Barb., 180; *Webber v. Williams College*, 23 Pick., 302; 2 Hill, 159; 2 Johns., 48.) In the interpretation and construction of all instruments, the object and intent of the parties, as collected from the whole instrument, are to be considered and effect to be given to them. (Platt on Cov., 138; Parsons on Part., 58; Coll. on Part., § 208; 1 Fonbl. Eq., 440; *Copperman v. Gallant*, 1 P.Wms., 315, notes; *Wescott v. Thompson*, 18 N. Y., 363; *Norton v. Woodruff*, 4 Seld., 442; *Rogers v. Keredan*, 10 Wend., 218; 13 Wend., 114.) The agreement was for a single venture and for a special purpose. (Parsons on Part., 57, 58; *U. S. Ins. Co. v. Scott*, 1 Johns., 112; *Brandred v. Mazzy*, 1 Dutcher, 268; *Chandler v. Brainard*, 14 Pick., 446; *Clark v. Reed*, 11 Pick., 450; *Sorter v. McClure*, 15 Wend., 187; *Patterson v. Blanchard*, 1 Seld., 186; *Heimstreet v. Howland*, 5 Denio, 68.) Assuming that Sardam was the general agent of the defendants, he could not bind his principals by note. (Story on Agency, §§ 106, 126; *Hantangen v. Brown*, 7 M. & W., 595; 23 Pick., 302; *Take v. Cameron*, 8 Metc.,

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458; *Page v. Stone*, 10 Metc., 160; *Vanderbilt v. Richmond Turnpike Co.*, 2 Comst., 482.)

*James F. Starbuck*, for the respondent. The associates were partners. (Pars. Mer. Law., 164; *Chase v. Bassett*, 4 Paige, 148; *Compton v. McNair*, 1 Wend., 457; *Tappan v. Bailey* 4 Metc., 529; *Sage v. Sherman*, 2 Comst., 418.) A joint stock association not incorporated is a partnership, although organized by its articles analogously to a corporation. (*Wells v. Gates*, 18 Barb., 554; *Dennis v. Kennedy*, 19 Barb., 517; 19 Wend., 424; 5 Hill, 478.) Acts are competent evidence, although the partnership is established by deed. (2 Greenl. Evi., § 483; 1 Chitty Pl., 30, note.) The partnership was liable, notwithstanding the articles declared the members should not be. (*Bank of R. v. Monteath*, 1 Den., 402; *Mechanics' Bank Ass'n v. N. Y. and Sar. Lead Co.*, 23 How., 74; *Olcott v. Tioga R. R. Co.*, 27 N. Y., 546, 559; *Angell & A. on Cor.*, 7 ed., § 297; *Royal British Bank v. Turquand*, 32 Eng. L. & E., 273; 11 John., 544; 6 Wend., 615.) The defendants directly recognized the validity of the notes. (Story on Part., § 192; Story on Agency, § 253, *et seq.*; Paley on Agency, 4 Am. ed., 171, and note.)

GROVER, J. Prior to the agreement of November 18th, 1863, there had been a corporation by the name of Redwood Iron Manufacturing Company, engaged in the manufacture of iron, at Redwood. This corporation had become extinct by the expiration of the time limited for its existence by its charter. At the time of its dissolution, it was the owner of certain real estate, and of some personal property adapted to such manufacture. On the 18th of November, 1863, all the stockholders in the late corporation, except one, made and signed the following agreement: "We, the undersigned, stockholders of the former Redwood Iron Manufacturing Company, hereby agree to unite in getting up a stock for another full-blast, or as near so as possible, and run the furnace and make iron; and we hereby constitute and authorize S. C. Sardam as

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Opinion of the Court, per GROVER, J.

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agent or superintendent to manage or carry on said furnace and getting up stock for said blast, to sell iron, and do everything pertaining to said business; and we individually agree at all times to furnish money when called on by said Sardam for the purpose of defraying the expenses for carrying on said business; that we are to pay *pro rata*, meaning in proportion to the amount of stock held and owned in said iron manufacturing company by each of us." Among the former stockholders, who signed the agreement were all of the appellants, and Sardam, the person named therein as agent or superintendent. Pursuant to this agreement, Sardam took possession of the real and personal estate of the late corporation, purchased stock, employed men, and prosecuted the business of manufacturing iron. The principal question discussed by counsel was, whether this agreement created a partnership as to third persons, between the parties thereto, in the business of manufacturing iron. The determination of this question, if in the affirmative, will substantially settle the rights of the parties to this action, as it will, in that event, be shown that Sardam had not only such powers of agency as were expressly conferred upon him by the agreement, but, in addition thereto, those of a partner in the firm. To determine whether a partnership was created by the agreement or not, its construction must be considered. The parties were the equitable owners, substantially, of the real estate to be used in the business, in proportion to the stock respectively owned in the late corporation. By the agreement, each agreed, in like proportion, to furnish the necessary capital to carry on the business of manufacturing iron therein, and, further, that this iron should be sold for their joint account by the manager of the business, appointed by them. It is obvious that all the parties under the agreement were entitled to participate in the profits acquired in the business, in proportion to their interests therein, which was in proportion to the capital contributed by each respectively, and were liable in the same proportion, as between each other, for any loss that might be incurred in the business. The agreement admits of no other construction.

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Such an agreement constitutes a partnership, as to third persons, within all the authorities, irrespective of any particular agreement between the partners themselves limiting the right of each to make contracts binding upon the firm. (Parsons' Mercantile Law, 164; Story on Partnership, §§ 2, 15, 18, 20, 75; Parsons on Partnership, 6; *Compston v. McNair*, 1 Wend., 457; *Bank of Rochester v. Monteath*, 1 Denio, 402.) Sardam being a partner, it follows that he was authorized to draw and accept drafts and make notes in the name of the firm, in all matters connected with the business of the firm, and that such paper would be valid as against all the members of the firm, in the hands of *bona fide* holders, although Sardam might have drawn, accepted or made it in fraud of the rights of his partners. Applying these principles to the present case, the right of the plaintiff to recover against the appellant the amount of the note in suit is manifest. The referee finds, and his finding is supported by the evidence, that Sardam drew upon Bostwick and Landon each a draft of \$5,000, and negotiated the same to White, in part to pay a debt owing by the firm to him, and in part for advances made by White to Sardam for the firm, and for money paid by White in taking up notes against the firm, to the entire amount of the two drafts; that White procured a discount of these drafts from the plaintiff; that they were sent forward for collection, and returned protested for non-acceptance; that, for the purpose of retiring these drafts, Sardam made the note in suit, payable to the order of White, who procured the plaintiff to discount the same, and with the proceeds pay and cancel the drafts. It thus appears that the proceeds of the note were applied directly for the benefit of the firm. Upon this ground, the plaintiff was entitled to recover. But it is said by the counsel for the appellant that the plaintiff did not know of the existence of the partnership at the time of discounting the drafts and notes. The testimony of the plaintiff's cashier, who transacted this business, shows this to have been true. He testified that the plaintiff had discounted paper for the corporation, and that he was unaware of its dissolution, and sup-



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posed that this was corporation paper. But this furnishes no answer to the claim of the plaintiff. The latter believed the paper to be that of the corporation, from the fact that the firm did their business in the same name; but this did not affect the right of the plaintiff to proceed against the real makers of the note, upon discovering who were transacting business under that name. This makes it unnecessary to inquire whether the plaintiff was not also entitled to recover upon the other grounds relied upon by the referee. I think he erred in holding some of the evidence, received to establish such grounds, competent. But the judgment cannot be reversed for that reason, because it clearly appears that the defendant was not prejudiced thereby; the plaintiff being entitled to recover, wholly irrespective of the truth of any fact that such evidence tended to establish. The same remark applies to the ruling of the referee that the appellants must be presumed to have known that Sardam was procuring notes to be discounted for the firm. The partners were bound by such notes, irrespective of such knowledge. The judgment appealed from must be affirmed, with costs.

All the judges concurring.

Judgment affirmed.

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ROBERT HARSHA, Respondent, v. WILLIAM REID, Appellant.

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In a contract for the sale of land, the presumption is, that the parties negotiate upon the land, and a representation as to the condition of buildings upon the premises, does not render the vendor liable in the absence of any fraud, fraudulent concealment or warranty.

A covenant by the owner of land not to permit a grist-mill to be erected thereon, is not a covenant running with the land, charging an unnamed assignee. It is a personal contract, binding only the covenantors, and their personal representatives. An action will lie against no one but the covenantor for a breach of this covenant; and a subsequent grantee of the lands will not be liable upon it.

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Upon decreeing specific performance of a verbal contract for the conveyance of real estate, upon the ground of part performance, the court will be governed by the same principles in adjusting the equities of the parties as upon a written contract, valid by the statute of frauds; and if the seller is not able fully to comply with the contract, the buyer has his election, either to have the contract specifically performed, so far as the seller can perform it, and to have an abatement out of the purchase-money, or compensation for any deficiency in the title, quality or other matters touching the estate.

But a court of equity cannot give a personal judgment in damages against a defendant, for an independent cause of action growing out of a contract void by the statute. An existing equitable cause of action, for a specific performance, will not create and secure to the party an independent cause of action, which would not exist and could not be enforced but for the equitable right of action.

Accordingly, in the case of an entire verbal contract for the purchase of land, and of a crop of flax growing thereon, under which the purchaser has entered into possession and made partial payments, in an action brought by him for specific performance, with an allegation of damages for breach of warranty as to the flax,—*Held*, that such damages were not recoverable.

(Argued April 21st; decided May 23d, 1871.)

APPEAL from the judgment of the late General Term of the Supreme Court, fourth judicial district, affirming the judgment of a referee, in favor of the plaintiff.

The action was for a specific performance of a verbal contract for the sale of an undivided half of certain lands, with mills and water privilege, and a large quantity of growing flax, and to recover compensation for certain defects in the title to the lands, as well as for deficiency in quantity, and also for a breach of warranty in respect to the flax. The contract was by parol, and entire, for a sale of the realty and the flax for a sum in gross, and the plaintiff, the purchaser, paid a part of the purchase-price, and entered into possession of the premises; and, after having been in possession for nearly two years, the mills and buildings were destroyed by fire. The plaintiff harvested the flax and converted the same to his own use. The action was tried by a referee, who found that the defendant represented the mill property to be in good repair, when it was not, and that the cost of putting it in

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repair was seventy-five dollars. He also found that the defendant represented the title to be good, and the premises free from encumbrance, and that he had, before the contract, granted to another, owning a mill lower down on the same stream, a given quantity of water, to be taken, under some restrictions, from the mill-dam on the premises sold, and that the premises were worth \$250 less by reason of such grant.

It was also found, that before the agreement with the plaintiff, the defendant had covenanted with a third person not to put a grist-mill upon the premises, and that they were worth \$250 less by reason of the restriction upon their use.

The referee also found that the defendant had warranted that the flax should yield a specified quantity of lint per acre, and that the yield was less than the quantity specified, and that the damages sustained by the plaintiff by reason of such deficiency was \$1,051.87. These several sums were allowed by the referee to the plaintiff, which, after deducting the unpaid purchase-price of the land and flax, left \$226.87 due the defendant, and judgment was given against the defendant for this amount, with costs, with a judgment for a specific performance of the agreement, by a conveyance of the lands subject to the easements mentioned. The judgment was affirmed on appeal by the General Term, and the defendant has appealed to this court.

*L. Fraser*, for appellant, cited *Erben v. Lorillard* (19 N. Y., 299); *King v. Brown* (2 Hill, 485); *Thayer v. Rock* (15 Wend., 53); *Baldwin v. Palmer* (10 N. Y. R., 232).

*C. L. Allen*, for respondent, on the points discussed in the opinion, cited *Barlow v. Scott* (24 N. Y., 40); *Alleston v. Johnson* (3 Sand. Ch., 72); *Jervis v. Smith* (Hoff., 470); *Mills v. Van Voorhes* (20 N. Y., 412); *Voorhes v. De Meyer* (2 Barb. Ch., 37); 1 Smith's L. Ca., 238; *Ryan v. Doe* (34 N. Y., 307).

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ALLEN, J. The brother of the plaintiff was a joint owner with the defendant of the property and interest which was the subject of the contract of sale at the time of the contract, and was instrumental in bringing the parties together and opening the negotiation, resulting in an agreement by the defendant to sell to the plaintiff his undivided moiety of the real estate and of the growing flax. The negotiation was had and the agreement made in the immediate vicinity, if not at or upon the mill premises. The presumption is that the parties were upon the land when the contract was made. (Per GARDNER, J., *French v. Carhart*, 1 Comst., 107.) A fraud cannot be assumed, without proof, under such circumstances, as to the condition of the property. The referee has charged the defendant with the cost of putting the mill property in repair, but he has not found, and there was no evidence tending to establish a warranty, in respect to the condition of the premises, or any fraud or fraudulent representation or concealment as to their state of repair or their condition. He properly held that the defendant was not liable to respond in damages for the discrepancy between the actual number of acres of the flax, and the number as represented by the defendant, because "there were no fraudulent representations made or deceit practiced as to that, and no warranty thereof." The same principle was applicable to the claim for damages on account of the condition of the buildings.

The referee also erred in holding the personal covenant of the defendant and others with Larkin & Co., that no one should be allowed to erect a grist-mill on the water privilege, which was included in the sale to the plaintiff, a charge upon the land and a restriction upon the use of the premises, by any one who should succeed to the estate and interest of the covenantors, especially one who should purchase without notice of the covenant. It was a personal covenant, and binding only the covenantors and their personal representatives. It granted no interest in the premises, and created no charge thereon. The covenantees did not derive title from the covenantors, but the covenant was an independent and

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personal contract, made upon and for a money consideration, in no way connected with the title. It was not a covenant running with the land, charging an unnamed assignee. No right was granted Larkin & Co. to build a mill, but the covenantors agreed that no mill should be erected. An action will lie against no one but the covenantors for a breach of this covenant. A subsequent grantee of the lands would not be liable upon it. (*Keppell v. Bailey*, 2 Myl. & K., 517.) Although the contract was not in writing, the plaintiff having in part performed it, and entered into the possession of the premises, and occupied the same, he was entitled to an action for a specific performance. Acting upon the faith of the contract, he has been placed in a situation which is a fraud upon him, unless the agreement is specifically performed. Notwithstanding the invalidity of the contract by the statute of frauds, there was a part performance, authorizing a court of equity to compel a specific performance. (2 R. S., § 10; 1 Story's Eq., § 761; *Malins v. Brown*, 4 Comst., 403.)

Upon decreeing specific performance of a verbal contract upon the ground of part performance, the court will be governed by the same principles in adjusting the equities of the parties as upon a written contract, valid by the statute of frauds; and if the seller is not able fully to comply with the contract, allow the buyer, at his election, to have the contract specifically performed, so far as the seller can perform it, and to have an abatement out of the purchase-money, or compensation for any deficiency in the title, quantity, or other matters touching the estate; that is, the purchaser may demand a partial performance of the contract, with compensation for any inability fully to perform. (1 Story's Eq., § 779; *Voorhees v. De Myer*, 3 Sandf. Ch. R., 614; *Mills v. Van Voorhees*, 20 N. Y., 412.)

The contract which may be performed specifically by the court, is the agreement to convey the land, and the vendor is estopped in equity from insisting upon the statute of frauds as against the claim for a specific performance; or, for such compensation, with partial performance, as shall be equiva-

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Opinion of the Court, per ALLEN, J.

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lent to a full performance. The action is brought to compel a conveyance of the land and real property purchased. It could be maintained for no other purpose connected with the agreement. The contract was void at law, and is only permitted to be performed in equity by reason of a partial performance, and to prevent a fraud. The plaintiff has had the full benefit of the contract, except the conveyance of the land. He accepted and received the flax, included in the contract of purchase, and appropriated the same to his own use.

A conveyance of the land would have completed the performance of the contract by the vendor, and the plaintiff could have made no claim beyond that. The contract was a single contract, embracing the realty and the personalty, and was void as to every part of it, and could not be the foundation of an action at law. (*King v. Brown*, 2 Hill, 485; *Thayer v. Rock*, 13 W. R., 53; *Van Alstine v. Wemple*, 5 Cow., 162.)

It was void for all purposes, even as evidence between the parties by which to measure the compensation to which either might be entitled to, in respect to matters connected with it. (*Erben v. Lorillard*, 19 N. Y., 299.)

A voluntary performance of a part of a contract, void by the statute of frauds, will not give an action to compel the performance of the residue; and this is true, although there has been a performance of all that part of the contract which is within the statute, and the residue upon which the action is brought is void only from its connection with the part already performed. (*Baldwin v. Palmer*, 10 N. Y., 232.) No action at law or equity could have been maintained upon the warranty, in respect to the yield and product of the flax.

Whether the defendant had refused to perform any part of the contract, or voluntarily performed the whole contract, would have made no difference. The plaintiff's right of action is not upon or for a breach of that warranty, and has no connection with the contract for the flax, except as that is incidentally connected in the same agreement with the

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Opinion of the Court, per ALLEN, J.

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agreement to convey the land. The statute of frauds and the principles of equity jurisprudence entitle him to a conveyance of the land, and not to an action for breach of a warranty, in respect to personal property, although the sale and warranty of the personalty was a part of the same contract under which the plaintiff claims a conveyance of the realty. If the defendant could fully perform the contract by conveying the whole land free from encumbrance, the quantity and estate to which the plaintiff is entitled under the contract, the judgment of the court could compel a strict performance, and could do nothing more.

The court could not pronounce and give personal judgment in damages against the defendant for an independent cause of action growing out of this contract, void by the statute. An existing cause of action in equity will not create and secure to the party an independent cause of action which would not exist and could not be enforced but for the equitable action. The plaintiff had the option, when it was found that the defendant could not convey the quantity of land or the estate to which he was entitled, to refuse to accept it. He was not bound to accept a partial performance, with compensation for the part unperformed. But electing to accept partial performance, with compensation for the inability of the defendant fully to perform, he was entitled to that compensation which, with the land, would place him in the same situation which he would have been, if he had got precisely that to which he was entitled. The money compensation, by way of abatement from the purchase-price, should be such as to give the plaintiff a precise equivalent for that which he has lost by reason of the inability of the defendant to convey the land as agreed; that is, the money and the land conveyed should be equivalent, as it stands, for the land agreed to be conveyed, and thus the plaintiff will have, substantially, a specific performance of this part of the contract, which alone he can have specifically performed.

He was not entitled to recover incidentally, and as a part of his relief in respect to the land, for a breach of the void

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warranty. There is no such tacking of causes of action known to the law.

The plaintiff has really recovered a money judgment for a breach of warranty confessedly void.

The judgment should be reversed, and a new trial granted, costs to abide event.

Judgment reversed and new trial ordered.

PECKHAM and GROVER, JJ., dissented. ✓

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LUCIUS BRADLEY, Executor, etc., Appellant, v. THE MUTUAL BENEFIT LIFE INSURANCE COMPANY, Respondent.

A policy of insurance contained the following clause: "In case the insured shall die by the hands of justice, or in the known violation of any law of the State he is permitted to visit, the policy should be void, null and of no effect." In an action on the policy,—*Held*, in order to justify the court in taking from the jury the question, whether the deceased came to his death in a manner covered by this clause, that whatever be the nature of the violation of law claimed as avoiding the policy, the death must clearly appear to have been the natural and legitimate consequence of such violation.

Accordingly, where the insured attempted to seize B's team, which B was driving, and B, abandoning the contest for the property, started for his house, but almost immediately turning, shot the insured, killing him,—*Held* (GROVER and PECKHAM, JJ., dissenting), that it was error in the court to refuse to allow the jury to pass upon the question, whether the death of the insured was caused by a known violation of law on his part, and whether the act of B, which produced the death, was a natural, reasonable, or legitimate consequence of the act of the insured.

Negative testimony is ordinarily of less weight than positive, but is not to be disregarded. The jury have a right to consider it, and where a witness testifies that he was in a position to see the whole transaction, and as to certain things testified to by another witness, states positively that they did not occur, and as to other things that he did not see them, there is such a contradiction as would justify the jury in discrediting or disregarding the evidence of either of the witnesses.

(Argued March 31st; decided May 23d, 1871.)

APPEAL from the judgment of General Term of the Supreme Court, in the first judicial district, affirming the decision of the Special Term, dismissing the complaint and ordering



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judgment in favor of the defendant, for \$419.06 costs and disbursements.

This action was brought upon a policy of insurance made by the defendant upon the life of M. J. Cluff, and assigned by him to B. E. Clark & Co., with defendant's consent, and subsequently assigned to B. E. Clark. Cluff died on the 25th of February, 1864, on a plantation hired and occupied by him, in Louisiana, having been shot by one Cox. The Cox family were squatters on the plantation, and had stock, which had been eating the feed belonging to the place. Cluff had tried to induce Cox's father to leave the plantation, but had not been successful. He had, some weeks before his death, sent a bill to the older Cox for the feed taken. On the day of the homicide, while standing by the gate of his plantation, he saw young Cox driving toward the house with a load of barrels filled with water. Cluff asked when the family were going to leave the place. Cox replied "they were going soon;" Cluff then asked when they were going to pay that bill; Cox replied they were not going to pay it; Cluff said, "if you don't pay it I will take your horses;" Cox replied, "you had better try it now;" Cluff said, "if you think I can't I will let you see," and thereupon began to unhitch the horses. He took the horses from the wagon, and upon Cox refusing to loose the lines, took from his pocket a small pen-knife, and was about to cut them, when on Cox telling him not to do that, he desisted. There was some evidence of a struggle, and blows on the part of both. Cox started, as if to go to the house, but after going a few yards, turned, drew a pistol, and shot Cluff through the heart. He cocked the pistol for a second shot, but upon Cluff crying out that he was hit, ran to the house. This is the account of one of the witnesses. The other testified to a struggle and blows.

There was a provision in the policy that "in case the insured shall die in the known violation of any law of the State he should be permitted to visit, the policy should be void, null and of no effect." The complaint was dismissed upon the trial, on the ground that it appeared by the evidence that the death occurred in the known violation of the law of the State where

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he then was. The plaintiff claimed that, as matter of law, he was entitled to a verdict upon the evidence, and, if not, he was entitled to go to the jury upon the question whether the death was the result of any violation of law by the deceased, but this was refused.

Cox was tried for the shooting by a provisional military tribunal and acquitted, on the ground that the homicide was justifiable.

The facts raising the question, as to the evidence of the transaction, are sufficiently stated in the opinion of the court.

*Benedict* and *Benedict*, for the appellant. The contract of life assurance is not a contract of indemnity, it is a mode of investment. (*Dalby v. The India and London L. & A. Soc.*, 28 Eng. L. & E., 317; *Miller v. The Eagle Life and Health Ins. Co.*, 2 E. D. Smith, 294; *Ranole v. Am. Life Ins. Co.*, 36 Barb., 362; *S. C.*, 27 N. Y., 282.) A policy of insurance is to be construed most liberally in favor of the assured. (*Palmer v. Warren Ins. Co.*, 1 Story, 360; *Yeaton v. Fry*, 5 Cranch, 335.) And an exception in a policy is to be taken strongest against the assurer. (1 Duer on Ins., 161; *Hindekofer v. Douglass*, 3 Cranch, 1; *Breasted v. The Farmers' Loan and Trust Co.*, 8 N. Y., 305; *Hoffman v. The Aetna Ins. Co.*, 32 N. Y., 405.) Capture means lawful capture. (*Swinerton v. The Col. Ins. Co.*, 9 Bosw., 361; *S. C.*, 37 N. Y., 174.) The exception, "by suicide," not included, where the person was insane. (*Breasted v. Farmers' Loan and Trust Co.*, 8 N. Y., 305.) The cause of death must be the proximate cause. (3 Kent's Com., 302; Arnould on Ins., 764; *Williams v. The Suffolk Ins. Co.*, 3 Sum., 276.) This maxim is applicable, "*Causa proxima, non remota spectatur.*" (*Patrick v. Com. Ins. Co.*, 11 Johns., 14; *Tilton v. Hamilton Ins. Co.*, 14 How., 372.) Dying in the known violation of law, "must be confined to the case where the assured died in the commission of a felony." (*Harper's Adm. v. The Phoenix Ins. Co.*,

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19 Mo., 506; 39 Mo., 122; *Cluff v. The Mu. Ben. Life Ins. Co.*, 13 Allen, 309; 99 Mass., 319; *Breasted v. Farmers' Loan and Trust Co.*, 8 N. Y., 304.) Trespass against another's property will not warrant the use of a deadly weapon. (*Commonwealth v. Drew*, 4 Mass., 391; *State v. Brandon*, 8 Jones, Law, 463, N. C.; *State v. McDonald*, 4 Jones, Law, 19; *Noles v. State*, 26 Ala., 31; *People v. Kirby*, 2 Park. Cr. C., 28.) Death caused by resistance to illegal arrest is manslaughter. (*Commonwealth v. Carey*, 12 Cushing, Mass., 246; *Roberts v. The State*, 14 Miss., 138; *Jones v. The State*, 14 Miss., 409; *Ree v. Patience*, 7 Carr. & Payne, 776.) Cox violated the law of his State in carrying a pistol. (R. S. of La., 155, § 116.) It is the "*turpis contractus*," "the object repugnant to justice or public policy," which makes the contract void. (*Fairbrother v. Ansley*, 1 Camp., 348, note; *Gray v. Matthias*, 5 Vesey, 286; *Trovinger v. McBurney*, 5 Cow., 253; *Wait v. Day*, 4 Denio, 439; *Fellows v. Emperor*, 13 Barb., 92.) If the contract is void in part, it is void in all. (*Burt v. Place*, 6 Cow., 431; *Barton v. Port Jackson Plankroad Co.*, 17 Barb., 397; *Pepper v. Haight*, 20 Barb., 429.) As to the effect of this condition on *bona fide* assignees, see *Moore v. Woolsey* (28 Eng. L. & E., 251); *White v. British Empire Mutual Life Ins. Ass.*, (7 Eng. Eq., Cases, 394). No presumption arises when the law of a foreign State is the ground of a claim or defence. (Cow. & Hill's note, 1136; *Pomeroy v. Ainsworth*, 22 Barb., 129; 8 John, 193; *Cutler v. Wright*, 22 N. Y., 47).

*Alvin C. Bradley*, for the respondent. The assured took the risk of his conduct, and must bear it. (*Stone v. Hooper*, 9 Cow., 154; *Allaire v. Orland*, 2 John. Cas., 52; *Conerty v. Benton*, 17 John., 142; *Mount v. Waits*, 7 John., 434; *Burt v. Place*, 6 Cow., 431, 433; *Moore v. Woolsey*, 28 Eng. L. & E., 248.) If the event be such as the most explicit of policies could not relieve, it remains unaided in spite of general terms. (Phillips on Insurance, §§ 210, 219; *Camp-*

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*bell v. Charter Oak Ins. Co.*, 92 Mass., 215; *Kelley v. Home Ins. Co.*, 97 Mass., 288.) Criminal law means any rule for the violation of which the State, in its own name, exacts a penalty or inflicts a punishment. (4 Black's Com., 5 N. 4, Christ. & Wend., ed.) No evidence having been given by either side of the law of Louisiana, the presumption is that it is the same as the common-law of this State. (*Holmes v. Broughton*, 10 Wend., 75; *Starr v. Peck*, 1 Hill, 270; *Legg v. Legg*, 8 Mass., 99; *Savage v. O'Neil*, 42 Barb., 374; *Russ v. Mut. Ben. Life Ins. Co.*, 23 N. Y., 516; *Cutler v. Wright*, 22 N. Y., 472; *Cheney v. Delafield*, 23 Barb., 498; *Robinson v. Donalley*, 3 Barb., 20; *Langton v. Young*, 33 Vt., 136; *Smith v. Whittaker*, 23 Ill., 367; *Thompson v. Moore*, 2 Cal., 99; *Smith v. Gould*, 4 Mo., P., 21; *Brown v. Gunning*, D. & R. N. P., 41 n.; *McCormick v. Garrett*, 5 D. M. G., 278; *Douglass v. Cray*, 2 Dow., 171; 1 Green, Ev., § 488, a.) Primary proofs are conclusive, and not open to contradiction by the plaintiff at the trial in any manner whatever. (*Campbell v. Charter Oak Life Ins. Co.*, 92 Mass., 213; *Cluff v. Mut. Ben. Life Ins. Co.*, 99 Mass., 317.) There was no question for the jury. The court had no alternative but to dismiss the complaint. (*Loomis v. Meeker*, 25 N. Y., 361; *Rudd v. Davis*, 3 Hill, 288; *affd.*, 7 Hill, 529; *Haring v. Erie R. R. Co.*, 13 Barb., 9.)

RAPALLO, J. The question directly presented by this appeal is whether, upon the evidence adduced at the trial, any question of fact arose which should have been submitted to the jury.

The counsel for the plaintiff insisted that, whether Cluff came to his death under such circumstances as to defeat a recovery, was a question for the jury, and also requested the court to submit to the jury the question whether the death of Cluff was a reasonable, rightful or excusable result of any known violation of law by him. But the court declined to submit that question to the jury, and decided that there was no question of fact in the case for their determination, and

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dismissed the plaintiff's complaint. Exceptions were duly taken to these decisions.

To justify this disposition of the case, it must clearly appear that it was established upon the trial, by uncontroverted evidence, that the death of Cluff happened under such circumstances as to fall within the excepted risks mentioned in the proviso contained in the policy.

The first step in the inquiry is the construction of this proviso. The exact interpretation to be given to the words "in case he shall die \* \* \* in the known violation of any law of these States," etc., has been the subject of serious debate. In another action upon a like policy of the same company on the life of the same party, which was tried four times in the State of Massachusetts, the Supreme Court of that State, in a carefully considered opinion, held that the proviso must be construed to refer to a voluntary criminal act on the part of the insured, known by him at the time to be a crime against the law of the State, and not to mere trespasses against property or infringements of civil laws to which no criminal consequences are attached. (*Cluff v. Mut. Ben. L. Ins. Co.*, 13 Allen, 308, 316, 317; S. C., 99 Mass. 318.) This conclusion is based by that learned court upon the natural import of the words "known violation of law," and upon their being found immediately following the words "by the hands of justice." A similar construction was adopted by the Supreme Court of Missouri, in the cases of *Harper's Administrators v. The Phoenix Ins. Co.* (19 Mo., 500, and 39 Mo., 122); and the case of *Breasted v. The Farmers' L. & T. Co.* (4 Seld., 299) has some bearing in the same direction.

The Supreme Court of this State, whose decision is now under review, do not agree to the interpretation given to the proviso by the courts of Massachusetts and Missouri, and a difference of opinion exists between the members of this court as to whether the proviso applies only to violations of the criminal law, or whether it embraces all illegal acts of such a character as to lead to violence. But, independently of that question, and whatever be the nature of the violation of

law urged by the insurance company, as avoiding the policy, it seems to be clear that a relation must exist between the violation of law and the death, to make good the defence; that the death must have been caused by the violation of law to exempt the company from liability. It cannot be the true meaning of the proviso that the policy is to be avoided by the mere fact that, at the time of the death, the assured was violating the law, if the death occurred from some cause other than such violation.

This position is fully sustained by the opinions of the court in the *Massachusetts* case, and seems to be conceded by the opinion of the Supreme Court, in the case now under review. Nor do I understand it to be controverted by the members of this court, who differ from the result at which I have arrived.

The more difficult question arises at the next step in the inquiry, namely, whether conceding that the act of Cluff, in attempting to detach the horses of Cox from the wagon was unlawful, and known by him so to be, the fact that his death was caused by that act, was so clearly established by uncontroverted testimony, as to justify the court in withdrawing the case from the jury, and dismissing the complaint.

In examining this question, it is necessary to throw out of view, all circumstances as to which the evidence was conflicting, and to look at the facts in the most favorable light for the plaintiff, in which the jury would have been at liberty to find them.

If any view of the facts, which the jury would have been justified in taking, would have sustained a verdict for the plaintiff, the dismissal of the complaint was erroneous.

Two witnesses only were examined as to the circumstances under which the death occurred. One of them (Scott) testified to a struggle between Cox and the deceased, and a blow inflicted by the deceased upon Cox, which was followed by the shot. The other witness, Dr. Bugbee, testified that he was the nearest person to the parties, and thought he saw all that occurred, but that he saw no scuffle or striking, and he

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states positively that the deceased did not assault Cox or threaten him; that the only threat was to take the horses, and there was no threat of personal violence on either side; that Cox was not beaten by deceased, nor personally attacked or assaulted; that after deceased had got possession of the lines, Cox (who had previously jumped from the wagon), started for the house, leaving Cluff standing by the heads of the horses; that when Cox got to the rear of the wagon, he turned, drew a revolver, and shot deceased, and then cocked his pistol to fire again, but hearing deceased say that he was hit, did not shoot again, but ran for the house; that Cluff died in the arms of the witness without uttering a word.

The jury were at liberty to adopt the statement of whichever of these witnesses appeared to them most credible. Although negative testimony is ordinarily of less weight than positive, yet it is not to be disregarded, but the jury have a right to consider it; and where a witness testifies that he was in a position to see the whole transaction, and as to certain things testified to by another witness, states positively that they did not occur, and as to other things, that he did not see them, there is such a contradiction as would justify the jury in discrediting or disregarding the evidence of one or the other of the witnesses.

Adopting the version of the transaction given by Dr. Bugbee, as the jury might have done, had the case been submitted to them, and considering his statement in connection with the other facts proved bearing upon the relations existing between Cox and Cluff, can it be said that beyond all question the act of Cox in firing upon and killing Cluff was caused by his attempt to take the horses, and was not an unjustifiable and wanton act, prompted by feelings of malice and revenge? It is not enough to say that, if Cluff had not made the attempt, he would not have been killed. The killing must have been a natural and reasonable consequence of the attempt to warrant a decision that it was caused thereby. Cluff's going to Louisiana and his taking a lease of the farm were links in the chain of circumstances which ended in his death. If he had

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not done those things he would not have been killed as he was. Yet it would not be reasonable to say that those acts were the causes of his death.

In *The Bank of Ireland v. Trustees of Evans Charities* (5 House of Lords Cases, 410), the fraud could not have been perpetrated, if the trustees had kept the seal securely. Yet it was held that negligence in the custody of the seal was too remotely connected with the fraud to render the trustees liable; for, as the court say, "the transfer was not the necessary or likely result of that negligence." See opinion of ERLE, Ch. J., in *Ionides v. Universal Marine Ins. Co.* (14 C. B. N. S., 259).

The proximate and not the remote cause must be regarded. The immediate cause of death was the shooting; and if Cluff so conducted himself that the shooting was a natural, reasonable and legitimate consequence of his acts, then it may be said that they caused the shooting. But if Cox fired with intent to kill, and his act was wholly beyond the scope of lawful resistance to the trespass of Cluff, and the provocation given by the latter was totally inadequate to excite or justify the character of violence which was used, and if the circumstances of the killing were such that rational men would attribute it to wanton malice rather than to an endeavor to resist aggression or even to natural indignation, then, although the deceased was in the wrong in the first instance, his wrong was but a remote and not a proximate cause of the death, and other causes, for which he was not responsible, intervened. Some analogy is afforded by the common-law rules in respect to acts of provocation, which will reduce a homicide from murder to manslaughter. In the *Commonwealth v. Drew* (4 Mass., 396), Chief Justice PARSONS states as a rule of law, that a trespass barely against the property of another, not his dwelling-house, is not a provocation sufficient to warrant the owner in using a deadly weapon; and if he do, and with it kill the trespasser, this will be murder, because it is an act of violence beyond the degree of the provocation; and as a general rule, every willful and intentional killing, with



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out a justifiable cause, if done with deliberation, and not in the heat of passion, is murder, and legal malice is always implied in such cases. (Per WALWORTH, Ch. 2 Park's Cr. R., 28.) Here it was not even left to the jury to say whether the killing was in the heat of passion. If the acts imputed to Cluff, though illegal, were not sufficient inducement to the homicide even to reduce the grade of the offence, it can hardly be said that they were the cause of his death.

The diversity in the statements of the witnesses as to the circumstances of the killing, and the necessity of an inquiry into the motive which actuated Cox, render it impossible to determine, as a question of law, that the killing was a reasonable or natural consequence of the acts of Cluff.

So long as the evidence falls short of establishing that the homicide was legally justifiable, I can see no safe rule by which the court could be guided in deciding that the provocation proved was the cause of the killing, and in withdrawing that question from the consideration of the jury.

The learned court in Massachusetts express the opinion, that if Cox shot Cluff, not in the course of the affray, but merely to revenge himself for what had been done, the case would not be within the proviso. (13 Allen, 318.)

This distinction is reasonable and seems to be applicable, whether Cluff's violation of law was criminal or not. If Cox abandoned the horses and started for his home, and afterward changed his mind, turned and maliciously shot Cluff, that was a new and independent event. There was some evidence to sustain that theory of the case. Bugbee testifies that Cluff got possession of the lines, and Cox started for the house; Cluff still standing by the horses' heads. That when Cox got to the rear of the wagon he turned, drew a revolver and shot Cluff, and cocked his pistol for a second shot, when, finding that Cluff was hit, he ran away.

It was impossible for the court to say, on this evidence, when Cox first formed the design of shooting, and that he did not intentionally and maliciously take the life of Cluff to satisfy his own feelings of revenge, after the seizure of the

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horses had been effected, and he had abandoned them. The accuracy of the aim, and the attempt to fire a second shot at an apparently unarmed man, were circumstances from which malice could be inferred. Furthermore, there were circumstances from which a hostile state of feeling on the part of Cox could be inferred independently of the taking of the horses. Cluff was turning the family of Cox off the farm, was hurrying their departure, and insisting upon their paying for the feed consumed by their cattle, and the tone of the conversation between Cluff and Cox evinced an angry state of feeling, which may have contributed quite as much as the taking of the horses, to the deadly assault made by Cox.

Under all these circumstances I think that the case should have been submitted to the jury, as requested by the plaintiff's counsel to determine under proper instructions, whether the death of Cluff was caused by a known violation of law on his part, and whether the act of Cox which produced the death, was a natural, reasonable or legitimate consequence of the acts of Cluff. The determination of these questions involved so many doubtful questions of fact, that they could not properly be disposed of by the court. One witness testifies to a personal conflict. The other denies it. If the first witness is to be believed, the blow struck by Cluff may have been the provocation for the shot; but the court could not act upon that statement, because it was contradicted. Under that state of the evidence, to decide the controversy by saying that, if the blow was not struck, the seizure of the horses was the cause of the shot, is subject to the objections, not only that it disposes of the case upon a hypothesis, and without ascertaining the actual facts, but that it involves a disregard of the circumstances tending to show that the shooting was with intent to kill, and a willful and deliberate act of malice or revenge, and does not even leave it to the jury to determine whether the killing was in the heat of passion, caused by the act of Cluff.

It would hardly be contended that if one should intentionally and deliberately kill another in consequence of some slight

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violation of a civil right, such as walking across his land without his permission, or other trivial trespass, the case would fall within the proviso, for no one would hesitate to say, that in the case supposed, the unlawful act of the deceased was a totally inadequate cause for the killing. Yet between such an act as that, and one which would in law justify the killing of the offender, there are an infinity of supposable cases involving different degrees of provocation, which cannot be measured so as to determine, as matter of law, their adequacy to produce a fatal result; and it can hardly be laid down, as a rule of law, that an attempt to take one's horses for debt, without process, but without any threat of personal violence, is of itself an adequate cause for intentionally killing the offender, and that a killing during or immediately after such an attempt, must necessarily be held a legitimate consequence of the act. Such an act may lead to violence, and, if any act of violence of the character which would naturally be resorted to, as a measure of resistance, should result in death, the necessary connection between the original illegal act, and the death, might be established. But the intentional killing of another with a deadly weapon under such circumstances, is a totally different affair, and cannot be held as matter of law, to be a natural or reasonable result or consequence of the original offence. It follows that the uncontroverted facts were not sufficient to justify a dismissal of the complaint, and that the case should have been submitted to the jury with proper instructions.

The judgment should be reversed, and a new trial ordered, with costs to abide the event.

GROVER, J. (dissenting.) The death of Matthew J. Cluff, whose life was insured by the policy in suit, having been proved, the question arises whether his death occurred under circumstances bringing the case within the proviso making the policy void, in case the death happened under the circumstances specified therein. The proviso declares the policy shall be null and void in case the said Matthew J. Cluff shall die, among other causes, by his own hand, or in consequence

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Dissenting Opinion, per GROVER, J.

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of a duel, or by the reason of intemperance from the use of intoxicating liquors, or by the hands of justice, or in the known violation of any law of these States or of the United States, or of the said provinces, or of any other country which he may be permitted under this policy to visit or reside in. The counsel for the appellant has ably discussed the meaning of the word "in," as showing the construction to be given to the phrase: known violation of any law of these States, etc., and as showing that the word may express various relations, those of time, place and condition being the most common, but that sometimes it may express the relation of cause and effect. This shows, not that the relation expressed is shown by this particular word, but rather by the other words of the sentence in which it occurs. It is insisted by the counsel for the appellant, that in order to bring the case within that part of the proviso, the death must occur or the cause thereof happen while the assured is engaged in the known violation of the criminal law of the State, and that the proviso does not include the known violation of a law for the protection of the civil rights of parties, the only sanction of which is a civil action for redress. This was so held by the Supreme Court of Massachusetts in *Cluff v. The Present Defendant* (13 Allen, 30), which was an action upon another policy issued by the defendant, containing a proviso similar in all respects to that in the policy now in suit. That conclusion was arrived at by the learned court, by an application of the maxim, *noscitur a sociis*. How this maxim can apply to the present case, or if applied, how the conclusion deduced by the court therefrom follows, I am unable to perceive. Among the associates is that of the death happening by reason of intemperance from the use of intoxicating liquors. It is obvious that, if the death happened from this cause, the case would come within the proviso, whether such use of intoxicating liquors was prohibited by the criminal law of the State where it occurred or not; applying the maxim to this, it might with equal propriety be argued that it was not the criminal law that was had in view by the parties, as that it

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Dissenting Opinion, per GROVER, J.

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was such law because death by the hands of justice is also included in the same proviso. To arrive at the intention of the parties to the contract we must consider the subject-matter in reference to which the language was used. What was the risk to be incurred by the defendant in insuring the life of Cluff? From the policy it appears that the defendant was willing to assume all the general risks to be incurred by such assurance to the extent of the amount insured. From the proviso, it appears that the defendant was unwilling to incur, and, therefore, refused to assume the additional risks to his life incurred, while the assured was engaged in the prohibited acts specified in the proviso, and, therefore, carefully provided that it should not be liable in case of death while engaged in the prohibited acts. Keeping these considerations in view, there will be but little difficulty in arriving at the intention of the parties, and, consequently, at the correct construction of the proviso. It is obvious that the violation of law in which the assured is engaged, whether such law be criminal or civil, must have some connection with the death, as cause and effect; not necessarily the immediate cause, as it is sufficient, if it puts in operation that cause. To illustrate: the sale of lottery tickets is prohibited by the criminal law of New York, no one would contend that had the assured died in the State of New York from heart disease, while engaged in selling lottery tickets, the case would have come within the proviso. It might have been within the strict letter, but not at all within the intention of the parties, for the reason that the violation of law, although criminal, had no possible connection with the death, and in no possible way increased the risk. Again the criminal law of New York prohibits profane cursing and swearing; suppose the death happened from some accident while the insured was violating this law, would this bring the case within the proviso? Clearly not, for the reasons above stated. Again, suppose the death occurred from injury received while the assured was attempting to obtain, by force, the possession of a chattel of which another was in peaceable possession, the title to which was claimed by both, but which

was really in the assured, the case would come within the proviso, for the reason that the risk was increased, and the death caused by the violation of law by the assured, although such law was the civil only, the deceased having committed no breach of the peace or any indictable offence. The Massachusetts court held in the same case, when again before it (99th Mass., 318), that the case would have come within the proviso had the assured, at the time of being shot, in furtherance of his attempt to get the horses from Cox, been committing an assault and battery upon him. The court, I think, must have overlooked the fact that the violation of law, in which the assured was engaged, was eminently calculated to cause violence dangerous to his life to be inflicted upon him, and that the very object of the proviso was to exonerate the defendant from liability, should death occur from this voluntary increase of risk. It follows, that when the death occurs during the known violation of law by the assured, when such violation eminently tends to violence dangerous to his life, the case comes within the proviso. It requires but a bare statement of the facts as to which there was no conflict in the evidence, to show that Cluff was engaged in such known violation of law, at the time he received the fatal shot causing his death in a few moments. He went from Massachusetts to Louisiana early in the winter of 1863-4, and in January or February of that year leased a plantation within the lines occupied by the federal troops, of which one Cox was in possession, but by what title did not distinctly appear. Cox and his family resided in a house upon the plantation, and his stock were kept upon the plantation and consumed some of the feed thereon. Cluff obtained possession of a part of the plantation and made efforts to obtain possession of the residue, but what he did in this respect does not appear. Cox left home, leaving his family in his house and his son, a boy seventeen or eighteen years old, in charge of his affairs. Cluff made out a bill of what he claimed on account of the stock being upon the premises, and caused the same to be delivered to a woman at Cox's house.

## Dissenting Opinion, per GROVER, J.

A few days after young Cox was going along the road with a pair of horses and wagon loaded with barrels of water. Cluff, upon being informed who it was, called to him to stop, and he did so. After some conversation not material, Cox asked the boy when he was going to pay the bill. The boy replied that he was not going to pay it at all. Cluff then said if he did not he would take the horses and stock. The boy replied he had better begin now. Cluff said, if you think I cannot take them I will show you, and thereupon went to the horse and unhitched the team, seized the lines, and told the boy to give them up, which he refused to do. Cluff then took out a pocket knife to cut the lines. The boy told him not to do that. Cluff desisted from that, went to the horses' heads, and commenced unfastening the lines from the bridle. The boy jumped from the wagon, went behind it, drew a pistol and fired at Cluff, hitting him in the side, causing death in a few moments. That Cluff knew he was violating law, is a proposition too plain for argument. The law of no country would justify his proceedings, which he must have known. The act was immediately calculated to lead to violence dangerous to his life and that of the boy. The case was thus brought directly within the proviso. The rule in this State is, that when facts are proved either by undisputed evidence or such a preponderance of evidence as to require the court to set aside a verdict finding to the contrary, it is the duty of the court to assume the truth of such facts and determine the legal rights of the parties upon such assumption. In Massachusetts it appears from the opinion of FOSTER, Judge (13 Allen, 316, *supra*), that the rule is different. He says, to establish this defence the burden of proof was upon the company, notwithstanding the evidence tending to prove a forfeiture came from the plaintiff's own witnesses. The case could not be withdrawn from the jury or a verdict for the defendant directed, because the defence rested upon an affirmative proposition, which the company was bound to maintain. The judgment of the General Term affirming that of the cir-

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cuit dismissing the plaintiff's complaint must be affirmed with costs.

PECKHAM, J., concurs with GROVER, J., for affirmance.

Chief judge and ALLEN, FOLGER and ANDREWS, JJ., concur with RAPALLO, J., for reversal.

Judgment reversed. New trial ordered.

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STEPHEN D. DILLAYE et al., Appellants, v. ELIZA GREENOUGH, Respondent.

THE SAME APPELLANTS, v. PATRIOK LYNCH et al., Respondents.

An antenuptial contract was entered into, whereby the husband was appointed trustee of real and personal property, and as such trustee was to have the entire and sole management, direction and control thereof, but it was silent as to the persons to be beneficially interested in the trust, —*Held*, that no trust was constituted, which the court could execute.

*It seems* that when the instrument creating the trust does not disclose the beneficiary, it does not necessarily result that the creator of the trust is such beneficiary.

(Argued together April 18th; decided April 25th, 1871.)

APPEAL from the judgment of the late General Term of the Supreme Court, in the fifth judicial district, affirming the report of a referee in favor of the defendants.

In 1844, William Malcolm died, possessed of real estate, which he devised to his children, of whom the plaintiff Charlotte was one. In August, 1848, Charlotte, then a minor, who, at the age of twenty-three, would take her share of the estate, and the plaintiff, S. D. Dillaye, entered into an antenuptial contract referring to the will, whereby Dillaye was constituted "trustee" of all Charlotte's property, real and personal, taken by law under the will, to have the entire and sole management, direction and control thereof, subject to the limitations and conditions thereafter mentioned. The appointment was declared to be irrevocable. By the second clause the said Charlotte, in consideration of the said marriage, sold and conveyed to Dillaye his heirs and assigns, in case there be no



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heirs of the body of the said Charlotte, lawfully begotten by the said Dillaye, all her estate, but in case of such heirs, lawfully begotten surviving him, then they to take. By the third clause, Dillaye, on his part, sold and conveyed to Charlotte, in case she survived him, all his estate, for her life, remainder to the heirs of their bodies.

The defendants claim certain parts of the real estate, by virtue of a deed from Dillaye and his wife, given subsequent to the trust, and duly recorded. Dillaye was informed by counsel that he could sell without interfering with his duties as trustee. Before commencing the action, the plaintiffs offered to pay back the original consideration, with seven per cent interest, to the grantee, on his accounting for the rents and profits. This was refused. There was no proof that the grantees knew of the antenuptial contract, independently of the record. Mrs. Dillaye was under age at the time she entered into the contract. The action was to recover possession, rents and profits, and have the deed to defendants declared void.

*George F. Comstock and S. D. Dillaye* in person, for the appellant. When no fraud is shown it is the settled policy of the law to sustain marriage agreements. (2 P. Williams, 243; *Acton v. Pierce*, 2 Vernon, 480; *Campson v. Cotton*, 17 Vesey, 264; *Randall v. Willis*, 5 Vesey, 262, 276, note; *Gavner v. Gavner*, 1 Dessau, 437; *Tisdale v. Jones*, 38 Barb., 523; *Strong v. Skinner*, 4 Barb., 546; 2 Kent's Com., 165.) Where a statute has no restrictive words, no exception will be made in favor of infants. (*Demarest v. Wynkoop*, 3 John. Ch., 146; *Bucklin v. Ford*, 5 Barb., 393; *Bickford v. Wade*, 7 Vesey, 87, 92; Angell on Lim., § 194; Tyler on Infants, 163.) Acts by which the intention to affirm is clearly signified amount to an affirmance. (*Murray v. Franklin*, 4 Dev. & Batt., 292; *Wheaton v. East*, 5 Yerger, 41, 62; *Phelps v. Green*, 5 Monroe, 533; *West v. Perry*, 16 Ala., 186; *Cecil v. Salisbury*, 2 Vt., 224; *Delano v. Blake*, 11 Wend., 85; *Jones v. Phœnix Bank*, 4 Seld., 235;

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*Palmer v. Miller*, 25 Barb., 399; *Henry v. Root*, 33 N. Y., 525; Dunlap's Paley on Agency, 171.) A second deed made after maturity will not revoke a prior deed of an infant unless there is an actual entry with intent to disaffirm. (*Booke v. Mix*, 17 Wend., 135; *Dominick v. Michael*, 4 Sandf., 419; *Voorhies v. Voorhies*, 24 Barb., 150; *Wetmore v. Kissam*, 3 Bosw., 327.) Mrs. Dillaye is not estopped by her deed from claiming her rights under the marriage agreement. (*Vanderlyder v. Jackson*, 17 Johns., 167; *Martin v. Dudley*, 6 Wend., 1; *Watkins v. Adams*, 24 N. Y., 72.) A right to recover in an action for the realty is not barred by a deed purporting to be a conveyance, but by which the right does not pass. (*Wolcott v. Knight*, 6 Mass., 418; *Williams v. Jackson*, 5 Johns., 493; *Dominick v. Michael*, 4 Sand., 423.) The recorded antenuptial contract was notice to subsequent purchasers. (1 R. S., 707; *Center v. Lyman*, 24 Vt., ; *Peck v. Mallams*, 10 N. Y., 526; *Towsley v. Towsley*, 5 Ohio, 78.) The will was made a part of the agreement. (*Jackson v. Parkhurst*, 4 Wend., 374; *French v. Carhart*, 1 Com., 104; *Briggs v. Palmer*, 20 Barb., 392; *Briggs v. Davis*, 20 N. Y., 21.) The reference to the will was sufficient notice to lead directly to the facts. (*Perry v. Arden*, 9 Johns. Ch., 267; *Green v. Flayton*, 4 Johns. Ch., 38; *Williams v. Brown*, 15 N. Y., 354.) The grantee could alone derive title through the will, and the will thus being a common source of title, it put him in full possession, in connection with the marriage agreement, of all the facts essential to constitute full notice. (*Wood v. Chapin*, 13 N. Y., 520; *Dart v. Vendors*, 407; *Willis v. Butcher*, 2 Brim., 466; *Quinn v. Campbell*, 2 Brim., 119; *Cuyler v. Brandt*, 2 Caine's Cases in Error, 326.) The deed was void independently of the recording act. (*Demarest v. Wynkoop*, 3 Johns. Cas., 145; *Bickford v. Wade*, 17 Vesey, 89, 92.)

*D. Pratt*, for the respondents. To transfer real estate, the deed should contain some fit and proper words for that purpose. (Hill on Trustees, 63; Tiffany's Laws of Trust, 11,

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351, 354; 4 Kent's Com., 490.) Acts may be used in the construction of an ambiguous contract.) (*French v. Carhart*, 1 Comst. R., 96, 102; *Livingston v. Ten Broeck*, 16 John., 22; 10 Vesey, Jr., 335, 338; *King v. Osborn*, 4 East, 327.) All express trusts are void, except those enumerated in the statute. (1 R. S., 728, § 55; *La Grange v. L'Amoreux*, 1 Barb. Ch., 18; *Wood v. Wood*, 5 Paige, 596.) The instrument must specify the trust. (*Selden v. Vermilyea*, 3 N. Y., 526; *Wood v. Wood*, 5 Paige, 596.) No estate vested in the trustee. (1 R. S., 729, § 58; *Clark v. Crego*, 47 Barb., 599; *Smith v. Bower*, 35 N. Y., 83.) The instrument was simply to give Dillaye a power in trust to manage the estate. (*Post v. Hover*, 33 N. Y., 593.) The parties so understood the instrument. (*Downing v. Marshall*, 23 N. Y., 366, 378; *Belmont v. O'Brien*, 12 N. Y., 400; 5 R. S., 322, 323, Edw. ed.) In an ante or postnuptial contract, creating a trust for the benefit of a married woman, she is treated in equity as the sole owner, vested with the title, with power to sell, mortgage, or otherwise charge the trust estate. (*Jaques v. Methodist Church*, 17 John., 548; *Demarest v. Wynkoop*, 3 John. Ch., 129; *N. American Coal Co. v. Dyett*, 7 Paige, 9; *S. C.*, 20 Wend., 670.) During her infancy, the estate was, by the terms of the will, in the executors; and any attempt to alien the land on the part of the *cestui que trust* was void during infancy. (*Cruger v. Jones*, 18 Barb., 467; 21 N. Y., 574; *McCasker v. Brady*, 1 Barb. Ch., 329; *Van Epps v. Van Epps*, 9 Paige, 237, 530; *Belmont v. O'Brien*, 12 N. Y., 401.) An infant's conveyance, by deed, of a remainder, is absolutely void. (Croke Car., 103; *Holt v. Sambach*, Chambers on In., 444; 2 Prest. on Con., 246, 247; 3 Atkins, 712.) All deeds of an infant which do not take effect by delivery of his hand are absolutely void. (Chambers on In., 445; *Zouch v. Abbott*, 3 Burr., 1794, 1804; *Stafford v. Roof*, 9 Cow., 626; *Fonda v. Van Horne*, 15 Wend., 631; Story's Eq. Jur., § 241.) The deed of an infant, which, upon its face, is clearly not beneficial to it, is absolutely void. (*U. S. v. Bainbridge*, 1 Mason, 71, 82; *McGan v. Marshall*, 7 Black;

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2 Kent's Com., 235: Chambers on In., 444; *Levering v. Heighe*, 2 Md. Ch., 81; *Tucker v. Moreland*, 10 Pet., 58, 70; *Oliver v. Hendlet*, 13 Mass., 239.) His negotiable note is void. (*Swansey v. Vanderheyden*, 10 John., 33.) So is his acceptance. (*Williamson v. Watts*, 1 Campb., 552.) He cannot appoint an agent or attorney. (*Bennett v. Davies*, 6 Cow., 393; *Roof v. Stafford*, 7 Cow., 179; *S. C.*, 15 Wend., 631.) His release of a legacy is void. (*Langford v. Frey*, 8 Humph., 443; *Fridge v. The State*, 3 Gill. & J., 104; 1 Pars. on Con., 244.) His surrender by deed is void. (*Lloyd v. Gregory*, Cro. Car., 502.) His grant of a rent charge out of his estate is void. (Chambers, 444; *Thompson v. Leach*, 3 Mo., 310.) A marriage settlement may be avoided after majority. (*Milner v. Hanwood*, 18 Vesey, Jr., 259; Chambers on In., 406.) It is not necessary, when the grantor has never had possession, that she re-enter upon the land. It is enough that she execute a second conveyance of the same land to another after she attains her majority. (*Slaughter v. Cunningham*, 24 Ala., 260; *Pitcher v. Laylock*, 7 Ind., 398; *Chesinger v. Lessee of Welch*, 15 Ohio, 156; 2 Md. Ch., 81; 1 Geo. Ch. Dec., 91; *Lessee of Drake v. Ramsey*, 5 Ohio, 256; *Dearborne v. Eastman*, 4 N. H., 441; *Howle v. Stowe*, 2 Dev. & Bat., 320; *Gill v. Woodward*, 3 Brevard, 401; *Jackson v. Carpenter*, 11 Johns., 539; *Jackson v. Burchin*, 14 Johns., 124; *Tucker v. Moreland*, 10 Pet., 58; *Eagle Fire Co. v. Dent*, 6 Paige, 635; *S. C.*, 1 Edw. Ch., 301; *Dominick v. Michael*, 4 Sandf., 374; *Doe v. Abernethy*, 7 Blackf., 442; *McGan v. Marshall*, 7 Humph., 121; *Litendorfer v. Hempstead*, 18 Mo., 267; *Peterson v. Laik*, 24 Mo., 541; *Zouse v. Norcoms*, 12 Mo., 549.) Since 1848 a *feme covert* has precisely the same power to convey that a *feme sole* has. (*Millwaine v. Hadel*, 30 How., 198; *Wetmore v. Kissam*, 3 Bosw., 321.) Mere acquiescence in a conveyance for a time after majority, without any intermediate or continued benefit, does not confirm it. (*Jackson v. Carpenter*, 11 Johns., 559; *Voorhies v. Voorhies*, 24 Barb., 150; *Goodsell v. Myers*, 3 Wend., 479.) The description of the premises in the instrument is

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too indefinite to make the record of it, notice to subsequent purchasers under the statute. (*Mundy v. Vawton*, 3 Grattan, 518; *Gilling v. Maas*, 28 N. R., 101; *Ludlow v. Van Ness*, 8 Barb., 176.) The clerk's neglect in indexing the record does not affect defendant's rights. The plaintiff must look to the officer. (*Sawyer v. Adams*, 8 Verm., 172.) The vendor is liable on covenants of warranty. (*Kolls v. De Leyer*, 41 Barb., 208; *Fowler v. Seaman*, 40 N. Y., 592; *Ballin v. Dillaye*, 37 N. Y., 35, 39.) The vendor is estopped from denying title which she has assumed to convey, and of which she has covenanted that she was seized. (*Jackson v. Stevens*, 16 Johns., 110; *Jackson v. Bull*, 1 Johns. Cas., 81; *Rathbun v. Rathbun* 6 Barb., 98.) The title, if restored, would pass by virtue of the estoppel created by the warranty. (*Jackson v. Stearns*, 16 Johns., 110; *Jackson v. Hubble*, 1 Cow., 613; *Bank of Utica v. Messereau*, 3 Barb. Ch., 528.) The second and third sections of the antenuptial contract are clearly testamentary, and not having been executed according to the statute on wills, are void. (1 Red. on Wills, 5.)

FOLGER, J. The learned counsel for the appellants conceded, that whatever right or interest in the premises in question was held by Dillaye in his own right, or by Mrs. Dillaye otherwise than as a *cestui que trust*, at the time of the execution of the deed to the defendants, passed thereby.

The issue of the marriage of Dillaye and Mrs. Dillaye take no present interest in the lands. If they shall have a right therein, it will not accrue until after the death of Dillaye. The court expresses no opinion as to whether they will or will not then have a right.

The ground, if any, upon which the deed to the defendants can now be assailed is this: that by the antenuptial contract, a valid express trust was created, and Dillaye constituted the trustee thereof, and that the deed to the defendants was void, as being in contravention of that trust. If it shall be found that a trust is created, it will not be difficult to determine that he is constituted a trustee, and

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clothed with the legal estate in the premises. The instrument in terms "makes, constitutes and appoints him a trustee." Such phraseology is inappropriate to create an attorney in fact or an agent. It is appropriate to create a trustee. The intention to appoint an agent, or an attorney in fact, would not find expression in such a formula. The intelligent intention to constitute a trustee, could choose scarcely a form more apt. The other phrase, conferring upon him the power, "to have the entire and sole management, direction and control," of all the estate, taken in connection with the other, is sufficient to endue him with the legal estate therein. From such power expressly given, the trustee would take, by implication, the legal estate. For a legal estate would be required to fully perform the duty of managing, directing and controlling the property. (*Brewster v. Striker*, 2 Comst., 19; *Leggett v. Perkins*, 2 Comst., 297.) But here the contract stops. Assuming the intention to have been to constitute a trustee, and to create an active trust in him, such intention could be satisfied, only in accordance with the provisions of the statute. The Revised Statutes (1 R. S., 728, § 55), declare, define or recognize the cases in which express trusts may be created: 1. To sell lands for the benefit of creditors; 2. To sell, mortgage or lease lands for the benefit of legatees, or for the purpose of satisfying some rent charge thereon; 3. To receive the rents and profits of lands, and apply them to the use of any person, etc.; 4. To receive the rents and profits of land, and to accumulate the same, etc. It is not claimed that a trust is created by this instrument within the first two subdivisions of the section. It is claimed that there is a trust to receive the rents and profits of lands. And doubtless the trust to manage, control and direct, is a trust to receive the rents and profits. But the instrument goes no further. It does not declare what shall be done with the rents and profits after they are received. There is no expression of what the trust is in this respect. In this silence of the instrument, if a trust is to be upheld, it must be for the court to say, from other facts, from circumstances not shown by the instrument or other writing, either

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that the rents and profits are to be applied to the use of a person, or to be accumulated for some purpose. And then, to go further, and without definite designation in the instrument itself or in any other writing, to point out the person for whose use they are to be applied, or the purpose for which they are to be accumulated, and to say in the last case, whether the trust is to commence on the creation of the estate, or at a time subsequent thereto. (1 R. S. 726, § 37.) It is urged that it may be implied from the very nature of a trust, that the trustee does not take for his own benefit. This being admitted, it is claimed that it necessarily results that the author of the trust was to be alone interested in its execution, no other person being named in that behalf, and that the estate was to be managed and controlled for her. But it does not so necessarily result that the author of a trust is to be beneficiary thereof, as that when the instrument is silent, the court may unerringly supply the omission. A trust and a trustee of real property, may be created by any writing which passes the legal title to the trustee, and contains a proper declaration of the trust. (Hill on Trustees, 63-4.) But the writing, must declare what the trust is. (*Smith v. Matthews*, 3 De. G. F. & J. 139.) The statute of frauds (2 R. S., 134, § 6), declares that no trust or power over or concerning any lands or in any manner relating thereto, shall be created unless by act or operation of law, or by a deed or conveyance in writing. Under a statute very like this in its provisions (1 R. L., 79, § 11), it was held that the trust must appear in writing, with absolute certainty as to its nature and terms, before the court can undertake to execute it. A trust must be manifested and proved by writing, and the nature of the trust, and the terms and conditions of it, must sufficiently appear, so that the court may not be called upon to execute the trust in a manner different from that intended. (*Steere v. Steere*, 5 J. C. R., 1.) Every agreement which is, by the statute of frauds, required to be in writing, must be certain in itself, or capable of being made so by reference to something else whereby the terms can be ascertained with reasonable precision, or it cannot be

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carried into effect. (*Abeel v. Radcliff*, 13 J. R., 297.) It would be wandering wide from the express provisions of the statute, and from the rules established by the courts, if we were to take up this instrument where it stops after constituting a trustee and giving the power of management and control, and to frame the trust itself by implication. Plausible reasons might be given for a trust to apply the rents and profits to the use of other than the author of the trust, or for a trust to accumulate them for some lawful purpose. There is no implication so clearly shown as that no other can by possibility be made.

But it is sufficient to say that the terms and conditions of the trust must be expressed in writing.

It follows, then, that there is no trust manifested by the antenuptial agreement which the court can execute. And further, that there is no right now existing and enforceable, in favor of which the court can adjudge in this action to any extent of the prayer of the complaint.

The judgment of the General Term should be affirmed, with costs to the respondent.

All the judges concurring except ANDREWS, J., who did not sit.

Judgment affirmed.

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RUSSELL STURGIS et al., Respondents, v. PAUL N. SPOFFORD, Appellant.

In the act of 1853 (ch. 467, § 29), providing for the election of commissioners of pilots, the word election was not used in any such sense as it is in the Constitution; or as the result of a choice by the ordinary mode of voting by the people. It is in legal effect an *appointment*, and comes within the meaning of *that* word, as used in the Constitution. The provisions of that act giving the appointment of such commissioners to the chamber of commerce, and the presidents of marine insurance companies, are not in conflict with the Constitution.

An act of congress upon a subject within its jurisdiction, but upon which there has been State legislation, does not have the same effect upon the latter as would its repeal. Such act merely indicates the intention of congress, from that time to assume the exercise of the powers con-



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ferred by the federal Constitution. The State law becomes from that time inoperative but is not repealed; the repeal of the act of congress would leave the State law in full force.

It cannot be presumed that any rights or interest secured, or obligations incurred under it (the State law), were intended to be interfered with, and hence a penalty incurred under the State law before, the act of congress is passed, may be recovered afterward.

The statute (ch. 248, § 29 of 1857), giving to the commissioners of pilots a penalty of \$100 against any "person employing a person to act as pilot not holding a license," does not authorize the recovery of but one penalty against a party who has employed an unlicensed pilot, although such employment was repeated for numerous ships.

(Argued April 5th; decided April 25th, 1871.)

APPEAL from a judgment of the General Term of the Supreme Court, in the first judicial district, affirming a judgment of the Special Term in favor of plaintiffs, for forty-six penalties of \$100 each. (Reported below in 52 Barb., 436.)

This action was brought by the plaintiffs, as commissioners of pilots, to recover certain penalties given by the act of 1853 (chap. 467, § 29), regulating pilotage in the port of New York, for employing a person not holding a license from the plaintiffs, or under the laws of New Jersey, to act as pilot. The cause was tried by DAVIS, J., without a jury. It was claimed, and the court found, that the defendant employed one John Magin to pilot certain steamers and sailing vessels bound outward from the port of New York. That Magin, at the time held a license under the act of congress of 1852. That he held a license under the laws of this State passed in 1836. That he took a license under the board of commissioners' of pilots in 1853, and each year thereafter, until 1860. The plaintiffs claim that he was suspended by the board, April 10th, 1860, but continued to act as pilot, no pilot being appointed in his place until a new license was issued to him April 26th, 1865. In the meantime, he piloted the vessels in question. The plaintiffs were appointed commissioners under the act of 1853, chap. 467.

*Erastus Cooke*, for the appellants. The plaintiffs had no power to take away Magin's license. The question of title to

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the office could not be tried in this collateral way. (13 Wend., 494; *People v. Tiernan*, 8 Abb., 362; *People v. Collins*, 7 John., 549; *Weeks v. Ellis*, 2 Barb., 321; 8 Paige, 428; *Greenleaf v. Low*, 4 Denio, 170; 5 Wend., 233; *Fowler v. Beebe*, 9 Mass., 231.) The pretended suspension could not take place until Magin's successor was appointed. (8 Abb., 363; *Reed v. The City of Buffalo*, 3 Keyes, 447.) The commissioners' of pilots claim to be public officers, and they having brought the action, their title is directly in issue. (*People v. Tiernan*, 8 Abb., 362; *People v. Hopson*, 1 Denio, 579; *Green v. Burk*, 23 Wend., 490; *Fowler v. Beebe*, 9 Mass., 234, 235.) An appointment to office is a judicial act. (*Wood v. Peake*, 8 John., 71; *Wildy v. Washburn*, 16 John., 49.) The power given by the federal Constitution to regulate commerce covers the whole subject of pilotage. (*Steamship Co. v. Joliffe*, 2 Wallace, 459; *Cooley v. Port Wardens of Phila.*, 12 How., 299.) When the power is once exercised by congress, it becomes exclusive. (*City of N. Y. v. Miles*, 11 Peters, 158; *People v. Brooks*, 4 Denio, 477; *Brown v. State of Md.*, 12 Wheat., 419; *Gibbon v. Ogden*, 9 Wheat., 197; Passenger case, *Smith v. Turner*, 7 How., 392.) The repeal of a statute, giving a penalty, extinguishes the right to the penalty, even though a prosecution is pending. (*Butler v. Palmer*, 1 Hill., 325, 330, 332; *Joliffe case*, 2 Wallace, 450, 464, 465, 466; *Hartung v. The People*, 22 N. Y., 100, 101, 102; *Commonwealth v. Duane*, 1 Binney, 601; *Board of Trustees v. City of Chicago*, 14 Ill., 334; *Norris v. Crocker*, 13 How., U. S., 429.) The same result follows when the law expires by its own limitation, pending the appeal from a judgment. (*Yeaton v. United States*, 5 Cranch., 281; Schooner "Rachel," 6 Cranch., 329.)

*William Allen Butler*, for the respondents.

CHURCH, Ch. J. The judgment recovered in this action is for forty-six penalties of \$100 each, in favor of the plaintiffs, as "commissioners of pilots," against the defendants' intestate, for employing an unlicensed pilot, as prescribed in the 29th section of chapter 243 of the Laws of 1857, which is

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amendatory of the general act regulating the subject of pilotage of the port of New York. (Chap. 467 of the Laws of 1853.)

It is objected that the appointment of the plaintiffs, authorized by the act of 1853, is not in accordance with the Constitution, and that they therefore have no lawful *status* as public officers, and cannot maintain the action. This objection was not made in the court below, but as it is jurisdictional in its character, it may be taken at any time.

This court has affirmed a judgment recovered by the commissioners of pilots, appointed under the act in question, in one instance, and sustained a recovery in another based upon liabilities created by the act; but in neither case was the constitutional question raised, and they cannot be regarded as authoritative in support of the validity of the act. (*Commissioners of Pilots v. Clark*, 33 N. Y., 251; *Cisco v. Roberts*, 36 N. Y., 292.) The act of 1853 provides that three of the commissioners shall be elected by the members of the chamber of commerce, and the other two by the presidents and vice-presidents of the marine insurance companies of the city of New York represented in the board of underwriters of said city. The provisions of the Constitution bearing upon this subject are contained in section two of article ten, which, after prescribing the manner of electing or appointing county, city, town and village officers, whose election or appointment is not provided for in the Constitution, declares that "all other officers whose election or appointment is not provided for by this Constitution, and all officers whose offices may hereafter be created by law, shall be elected by the people or appointed as the legislature may direct." Although the word "election" is used in the statute, it cannot be supposed that the legislature intended it in any such sense as that word is used in the Constitution or as the result of a choice by the ordinary mode of voting by the people. The mode prescribed by the statute for selecting these officers is, in legal effect, an appointment, and comes within the meaning of that word as used in the Constitution, and the misnomer of the legislature cannot change the real character of the act provided for.

The offices of commissioners of pilots had no existence at the time of the adoption of the Constitution of 1846, and there were no officers authorized by law existing at that time who exercised the same or similar functions. The power exercised by the legislature was derived from the last clause of section two above quoted.

Commissioners of pilots are officers whose offices were created by the legislature since the adoption of the Constitution, and by the language of the section they must be either elected by the people or appointed, as the legislature may direct. It is insisted that the power of appointment can only be conferred upon somebody or officer representing or responsible to the people. The language of the Constitution does not justify this position. The power is not restricted. I agree that express limitations are not necessary, but they may be implied. The provisions for organizing the executive, legislative and judicial departments of the government exclude any other mode as effectually as if negative words were used, and so of any other provisions. Legislation, inconsistent with affirmative provisions of the Constitution, cannot be tolerated. Otherwise that instrument might be subverted by indirection. This principle has no application in this case.

County, city, village and town officers, whose election or appointment is not provided for in the Constitution, are directed to be appointed by section two in a certain specified manner, but the framers of the Constitution carefully omitted any direction in the next clause of the section as to the manner of appointment of officers whose offices should be thereafter created. The omission of any direction as to the appointment of such officers is significant of the intention of the framers and the people to leave the unrestricted power in the legislature. The inconsistency with the mode prescribed for appointing or electing the enumerated officers is one authorized by the express provision of the Constitution itself. These are neither county, city, village or town officers, but are officers of the State, and relate to the exercise of national

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power in protecting commerce and providing means for averting the dangers of ocean navigation. The power has been conferred upon congress, but until its exercise by that body, each State exercises it for itself.

This act is not obnoxious to the objections made to the Metropolitan Police bill, as the officers created by it are not among those enumerated, nor do they absorb or interfere with the functions of any existing office. (*People v. Draper*, 15 N. Y., 532.)

It is also claimed that the legislation of congress has superseded the act in question, and all State legislation on this subject. It is doubtless true that the whole subject of pilotage is embraced in the power conferred upon congress by the Constitution of the United States, to regulate commerce with foreign nations, and among the several States; but until the exercise of this power by congress, it is competent for the States bordering upon the sea, to exercise it themselves. The jurisdiction of the States has been acquiesced in by the general government from its foundation, and has been expressly recognized by congress. (See act of 1789.)

The act of congress of 1852 (10 United States Statutes at Large, 61, 67) is claimed to have superseded the act of the State; but in *Steamship Co. v. Joliffe* (2 Wall., 450), it was held, by the Supreme Court of the United States, that this act applied only to pilots for the voyage, and not to port pilots, and did not affect State legislation as to the latter. (*Cisco v Roberts*, 36 N. Y., 262.)

The act of congress of August, 1866 (14 United States Statutes at Large, 228), is more comprehensive in its provisions, and seems to include pilotage in harbors as well as at sea. In February, 1867, this act was amended, so as in substance to exempt port pilotage from its operation, and leave to the State its former power of legislation. (14 United States Statutes at Large, 411.) The penalties for which this action was brought had been incurred before the act of congress of 1866 was passed, but the trial and judgment was afterward. The jurisdiction of congress becomes exclusive upon its

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exercise, which precludes all State action and supersedes all State laws previously passed. Assuming that the act of 1866 embraced port pilotage, it is insisted that the penalties, previously incurred under the State law, became extinguished and abrogated. It is a general rule that criminal offences created by statute cannot be prosecuted or punished after the statute is repealed. (*Hartung v. People*, 22 N. Y., 95, and cases there cited.) And this rule has been extended to quasi criminal prosecutions for penalties. (*Butler v. Palmer*, 1 Hill, 330.) Although a forfeiture or penalty for the benefit of the party injured is regarded as a vested right in the nature of a satisfaction (*Palmer v. Conly*, 4 Denio, 374), if the statute in question had been repealed by the legislature of the State, the penalties and all power to enforce them would have gone with the law.

The repeal of the statute would have obliterated the law and all rights of action given by it. (*Key v. Goodwin*, 4 Moore & Payne, 341, 351.) But I do not think the act of congress had the same effect as a repeal of the statute by the State itself. The act is not retrospective in terms. It indicates an intention from that time to assume the exercise of the power conferred by the Constitution, and the State law became from that time inoperative; but it is not repealed, nor can it be presumed that any rights or interests secured or obligations incurred under it were intended to be interfered with.

The repeal of a statute indicates a change of policy on the part of the State upon the particular subject, and it would be inconsistent to enforce the provisions of an act, after the State had declared it to be unwise. In this case the propriety of the State law is not even impliedly questioned. The repeal of the act of congress would leave the State law in full force, and the amendment of February, 1867, produced the same effect; and there is no sound reason for depriving the State of rights secured under the law before the interference of congress.

The only remaining question necessary to consider relates to the amount of the recovery. As before stated, the recovery

was for forty-six penalties of \$100 each. The statute imposing the penalty reads as follows: "All persons employing a person to act as pilot, not holding a license under this act, or under the laws of the State of New Jersey, shall forfeit and pay to the 'board of commissioners of pilots' the sum of \$100."

The act is general in its terms. It is the employment of an unlicensed pilot, for which the penalty of \$100 is incurred. It does not say for each employment, nor for each offence, nor for each ship unlawfully piloted. Penal statutes are to be construed strictly, and the language will justify the construction that but a single penalty is incurred for all of the alleged unlawful acts of the party prior to the commencement of the action.

"All persons employing" are liable, whether the unlicensed person employed piloted one or fifty ships. It is still but an employment. (*Washburn v. McInroy*, 7 J. R., 134; *Tiffany v. Driggs*, 13 J. R., 252.) Prosecutions for aggregated penalties should not be encouraged. Penalties are often incurred inadvertently, or under a claim of right, and if the prosecution is promptly instituted for a single offence, it operates as a salutary warning to discontinue the practice, or acts complained of, while delay may be regarded as an acquiescence in the right of the party to perform the acts. The employment of McGinn as a pilot was claimed to be justifiable under the United States statute, and the alleged invalidity of the State act, and involved serious legal questions.

The plaintiffs delayed prosecution for two years, and then recovered nearly five thousand (\$5,000) dollars, while an action for a single penalty would have been just as potent to settle the legal questions involved. It is a wholesome rule not to allow a recovery for aggregated penalties, unless the language of the statute clearly requires it. Under this rule the party prosecuted will have an opportunity to desist from doing the act complained of, and if he does not, he will knowingly incur all the hazards of repeated prosecutions.

## Statement of case.

The judgment is affirmed for \$100, the amount of one penalty, and reversed as to the residue, without costs to either party in this court.

Affirmed for \$100, reversed as to the residue.

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WILLIAM M. CLINTON, Respondent, v. THE HOPE INSURANCE COMPANY, Appellant.

It is not essential to the validity of a contract of insurance, that the person to be insured thereby should be named in the policy. If the name of the person for whose benefit the insurance is obtained, does not appear upon the face of the policy, or if the designation used is applicable to several persons, or if the description of the assured is imperfect or ambiguous, so that it cannot be understood without explanation, extrinsic evidence may be resorted to, to ascertain the meaning of the contract. And when thus ascertained, it will be held to apply to the interests intended to be covered by it; and they will be deemed to be comprehended within it, who were in the minds of the parties when the contract was made.

In 1863, a policy of insurance on real and personal property was issued by the defendant upon the written application of the owner, to another company, and survey annexed thereto. In 1865, R., the insured, having died, his executrix applied, by letter, to the agent of the defendant, with whom the written application above mentioned and survey were filed, for a new insurance upon the same property; and a policy was issued by the defendant insuring "the estate of R." a certain amount upon the factory building and a certain other amount upon the movable machinery therein, as per survey on file at the office of T" the agent. This policy contained clauses avoiding the policy upon any assignment of property without the assent of the defendant, and making the statements in any survey referred to in the policy, warranties by the insured. Also, a clause that the policy was made with reference to "a survey on file in this office."—*Held*, in an action upon the policy, that any application and survey must have been on file in the office of the company to be effectual as forming a part of the second contract of insurance. The survey on file in the office of the agent, could only be used as a convenient method of identifying the articles of machinery covered by the policy. It did not make the other statements, found in it, a part of the new contract of insurance.

The party to a contract who seeks to destroy its obligations by reason of an alleged breach of a condition precedent by the other party, cannot establish the existence of such a condition by inference or conjecture. The terms of the contract must be clear and explicit in his favor.



## Statement of case.

The mother and the guardian of certain infants made a contract to sell real estate and personal property belonging to them, as soon as the guardian could obtain the requisite authority from the court. This property had been insured for the benefit of the "estate." The vendee entered into possession as tenant, paying rent. Much of the property was destroyed by fire before the contract was consummated. None of the papers or orders were filed until after the fire. After that event, a new contract was entered into between the same parties, the vendee purchasing the real estate and the claims for insurance, and taking a deed,—*Held*, that the vendee, by the first contract, acquired no title to the property, and by his second contract, the claims to recover the amount insured were not extinguished.—*Held*, further, that the destruction of the property, which fixed the liability of the insurers, at the same time discharged the vendee from his obligation to purchase; and, therefore, that the insurers could not be subrogated to that obligation to the extent of their liability for the insurance.

(Argued March 28d; decided April 4th, 1871.)

APPEAL from the judgment of the General Term of the Supreme Court, in the sixth judicial district, affirming the judgment rendered upon a verdict for the plaintiff. Recovery, \$3,366.52.

This action was brought upon a fire insurance policy, issued by the defendant on the 27th of February, 1865, insuring the "estate of Daniel Ross" for one year to the amount of \$3,000 against all loss by fire on the New Berlin cotton mill and the fixed and movable machinery therein. The mill was destroyed by fire June 28th, 1865, and due proof of loss was furnished. The claim was assigned to the plaintiff.

The insured property was owned by Daniel Ross until his death. The defendant had previously, in 1863, insured the property, making a written application of Ross and a survey, which was on file with the agent of the company at Utica, a portion of the policy. The home office of the company was at Providence, R. I., where the policy was issued. In July, 1864, Ross died intestate, leaving a widow and three children all under age. The personal estate of the deceased was more than sufficient to pay all his debts. In August, 1864, letters of administration were duly granted to Mrs. Ross. This insurance, among others, was applied for by her in behalf and

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Statement of case.

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for the benefit of the widow and children, she paying the premiums out of moneys belonging to the estate. The defendant's agent issued and sent policies of various companies, and among others the one in suit, in all for \$23,000. The plaintiff gave evidence to show that the intention of the parties was to effect an insurance upon both real and personal property for the benefit of the widow and children. The expression in the policy was "the estate of Daniel Ross." The mill was not working at the time of the insurance, but the insured had permission to run it, which permission was indorsed in red ink by the agent on the margin of the survey on file at the office of such agent. April 1st, 1865, Henry Tew was duly appointed general guardian of the three children. May 25th, 1865, a petition was presented to, and an order made by the court, for the appointment of Tew as special guardian, in proceedings for the sale of the infants' real estate, upon his giving the required surety. A referee was appointed, but he was not to proceed until the production of the clerk's certificate of the filing of the security. May 29th, 1865, the widow and Tew, as guardian of the infants, together with the plaintiff, executed a written instrument bearing that date, whereby Tew, under an order of the court yet to be obtained, promised to sell as special guardian, the widow releasing her dower right to the plaintiff, the factory, farm, buildings, etc., owned by deceased Ross at his death, when the order for that purpose could be obtained from the court. The plaintiff to pay \$22,000, besides reimbursing the insurance premiums from May 29th, 1865; \$500 to be paid down; and was to assign and guaranty a mortgage for \$4,500; and on delivery of the deed, to execute a bond and mortgage on the premises for \$16,000, the factory and machinery to be kept insured by him. He was to have immediate possession and to have all the personal property in the factory, but was to hold and possess the factory and premises, machinery and property, as the tenant of the estate, until the deed was executed and delivered, and at the rate of \$1,500 a year rent. June 3d, 1865, the referee's report, dated May 31st, was pre-

## Statement of case.

sented to the court, and it thereupon made an order authorizing Tew to sell, upon the plaintiff complying with the conditions of his agreement. None of these papers were filed or orders entered until the 13th of November, 1865. On May 29th the plaintiff entered into possession. Nothing was done under the contract of May 29th, after the fire, except to pay the rent provided for. On the 4th of November there was assigned to the plaintiff the claim against the defendant for loss by fire, and a deed and release of the real estate.

Upon the trial, at the close of the proofs, the defendant's counsel moved for a nonsuit. The court denied the motion, and ruled that the only application for this policy was oral or by letter, and that no survey proved should be deemed referred to in the policy so as to constitute a warranty by the assured; that the estate had and continued to have an insurable interest in the property insured at the time the policy was issued, and at the time the property was destroyed; that the plaintiff was in possession of the insured property as tenant at the time it was destroyed and no title vested in him until the conveyance in November, and that the right of action was not destroyed by the plaintiff taking that deed, or on his paying the sum named in the contract. The case is reported below. (51 Barbour, 647.) The references to the applications and survey contained in the policy are stated in the opinion.

*E. G. Lapham* and *Samuel Hand*, for the appellant, on the question of the effect of the survey, cited *Chaffee v. Cattaraugus Mut. Ins. Co.* (18 N. Y., 376); *Ripley v. The Aetna Ins. Co.* (30 N. Y., 136); *Gates v. Madison Co. Ins. Co.* (2 N. Y., 43); *Burritt v. The Saratoga Mut. Ins. Co.* (5 Hill, 191); *Murdock v. Chenango Mut. Ins. Co.* (2 N. Y., 210); *Smith v. Empire Ins. Co.* (25 Barb., 479); *Le Roy v. Market Ins. Co.* (39 N. Y., 90). It makes no difference, that the application or survey was made on a former occasion, and to a different company.

The administratrix had no insurable interest in the property insured. (*Herkimer v. Rice*, 27 N. Y., 163; *Colburn v. Lansing*, 46 Barb., 37); *Phelps v. Gebhard Fire Insurance Co.*, 9 Bosw., 411; *Beach v. Bowery Insurance Co.*,

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8 Abb., 261, note.) The party insured must have an insurable interest in the property, both at the date of the policy and at the time of the loss, or no recovery can be had. (*Fowler v. Washington Ins. Co.*, 26 N. Y., 422; *Freeman v. Fulton Ins. Co.*, 14 Abb., 398; *Howard v. Albany Ins. Co.*, 3 Denio, 303; *Grosvenor v. Atlantic Ins. Co.*, 17 N. Y., 392.) The sale of the infant's real estate was a judicial sale, and the deed related back to the time when the contract of sale was confirmed by the court. (*McLaren v. The Hartford Ins. Co.*, 1 Seld., 151; *Gates v. Smith*, 4 Edw. Ch., 702; Dart on Vendors, 560.) The purchaser could insure the full value of the estate purchased, the estate of Ross, only for the unpaid purchase-money. (Angell on Ins., § 66; Digest Ins. Decis., 392, § 9; *Mason v. Salisbury*, 3 Doug., 61; *Hart v. W. R. R. Co.*, 13 Met., 99; *Ætna Ins. Co. v. Tyler*, 16 Wend., 385.) In no event could the plaintiff recover any greater amount than the administratrix could have recovered if she had not assigned the policy. (*Grosvenor v. Atlantic Ins. Co.*, 17 N. Y., 395; *Carpenter v. P. & W. Ins. Co.*, 16 Peters, 495; *Foster v. Equitable Ins. Co.*, 2 Gray, 216.)

*J. E. Dewey*, for the respondent. The widow's interest was only a claim of dower; it would not pass even by her deed. (*Tompkins v. Fonda*, 4 Paige, 448; *Stewart v. McMartin*, 5 Barb., 438, 446; *Moore v. The Mayor*, 4 Seld., 113; *Lawrence v. Miller*, 2 Comst., 254; *Ash v. Cook*, 3 Abb., 389; *Siglar v. Van Riper*, 10 Wend., 414, 419; *Scott v. Howard*, 3 Barb., 319.) The common-law fixes the risk, where the title resides. (*Joyce v. Adams*, 4 Seld., 296, 297.) If there be a condition precedent to the passing of title, no title vests in personal property, until condition performed. (15 N. Y., 409; 26 N. Y., 599; 47 Barb., 646; 4 Seld., 271; 1 Abb. N. S., 349; 2 Hill, 326; 6 Barb., 362.) On the question of the contract of sale, see *Williams v. Fitch* (18 N. Y., 548); *Kimberly v. Patchin* (19 N. Y., 335); *Langley v. Warner* (3 N. Y., 329); *People v. Ransom* (2 Hill, 53); *Ex parte Newell* (4 Hill, 610); *Evertson v. Evertson* (5

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Paige, 649); 24 N. Y., 392, 393. The policy was issued on mere request, and not connected with any survey. On this question, see 7 Hill, 124; *Mellen v. The Hamilton F. Ins. Co.* (17 N. Y., 615); Ang. on Ins., § 141; 14 N. Y., 262, 263; 17 N. Y., 195, 197; 14 Barb., 383, 385; 32 N. Y., 405. The survey must be construed most strongly against the insurer. (*Hoffman v. Aetna Ins. Co.*, 32 N. Y., 405; *Springsteen v. Janson*, 32 N. Y., 703; *Rapelle v. Stewart*, 27 N. Y., 315.) Contracts of insurance must receive a liberal construction for the attainment of the ends which the parties had in view. (*Howard v. Albany Ins. Co.*, 3 Den., 304; *White v. H. R. Ins. Co.*, 15 How., 288; *Springsteen v. Janson*, 32 N. Y., 703; 17 N. Y., 426; 17 N. Y., 198.) The policy is broad enough to cover not only the legal, but the beneficial interest. (*White v. H. R. Ins. Co.*, 7 How., 349, 350; *Hoffman v. Aetna Ins. Co.*, 32 N. Y., 405; 17 N. Y., 198.) Evidence may be introduced to show whose interest was intended to be insured. (*Bidwell v. N. W. Ins. Co.*, 24 N. Y., 302; *Blossom v. Griffin*, 3 Kern., 569; *Bidwell v. N. W. Ins. Co.*, 19 N. Y., 182, 183; 17 N. Y., 428, 433, 434; 2 Sandf., 497; Ang. on Ins., § 99.) The assured had a right to rent out of the assured property. (*Gates v. M. M. Ins. Co.*, 1 Seld., 478; Ang. on Ins., §§ 169, 171; *O'Neil v. B. F. Ins. Co.*, 3 Comst., 122; 32 N. Y., 399.) A contract to sell the insured property at a future time, is not such an alienation as is prohibited by the policy. (Ang. on Ins., §§ 195, 206, 210; *Ballard v. Burget*, 47 Barb., 646; *Aetna Ins. Co. v. Taylor*, 16 Wend., 395, 396; *Masters v. Mad. Mut. Ins. Co.*, 11 Barb., 624.) All the facts were known to defendants' agent; he made the policy, and they (the company), are estopped, no fraud being shown. (*Rowley v. Empire Ins. Co.*, 36 N. Y., 550; *Masters v. Mad. Ins. Co.*, 11 Barb., 625; 1 Daly, 8; 14 N. Y., 253, 263, 264; 18 N. Y., 392, 394; 34 Barb., 213, 215; Ang. on Ins., §§ 191, 470.)

ANDREWS, J. The contract of fire insurance is one of indemnity, and no recovery can be had upon it, unless the

assured had, at the time of the insurance and of the loss, an interest in the insured property.

It is claimed by the defendant that the contract upon which this action is brought was made by the company with the administratrix of Daniel Ross, and in respect to her interest in the insured property, and that no recovery can be had for the loss of the mill mentioned in the policy, for the reason that the administratrix, as such, had no insurable interest therein.

If the premises upon which this claim of exemption from liability is based are true, the recovery cannot be sustained. An administratrix takes the legal title to the personal property, but she has no estate in the real property of the intestate.

It was held in *Herkimer v. Rice* (27 N. Y., 163), that when the personal estate of an intestate was insufficient to pay his debts, the administrator had an insurable interest in the buildings upon the land of the deceased, on the ground that he is a trustee of a power to sell the land upon the order of the surrogate for the benefit of creditors, and that as the interest of creditors is the subject of insurance the administrator may insure for their benefit.

It is admitted in this case that the personal estate of the intestate was more than sufficient to pay his debts, and the administratrix had, therefore, no interest in the real estate to support a contract of insurance. The defendant, by the policy in question, undertook to insure "the estate of Daniel Ross" against loss or damage by fire, upon property described as a cotton mill building, and the fixed and movable machinery therein.

The person or persons to be insured are not named in the policy, nor is this essential to the validity of the contract of insurance.

If the name of the person for whose benefit the insurance is obtained does not appear upon the face of the policy, or if the designations used are applicable to several persons, or if the description of the assured is imperfect or ambiguous, so that it cannot be understood without explanation, extrinsic evidence may be resorted to, to ascertain the meaning of the

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contract; and when thus ascertained, it will be held to apply to the interests intended to be covered by it, and they will be deemed to be comprehended within it who were in the mind of the parties when the contract was made. (1 Phil. on Ins., 163; *Colpoys v. Colpoys*, Jacob., 451; *Burrows v. Turner*, 24 Wend., 277; *Davis v. Boardman*, 12 Mass., 30; *Newson's Adm'rs v. Douglass*, 7 H. & John., 417.)

The evidence leaves no doubt as to the persons intended by the designation "the estate of Daniel Ross."

The agent of the defendant, to whom the application was made, was informed that the insurance was desired for the benefit of the widow and heirs of Daniel Ross; the policy was subsequently issued by him, and the language used to designate the assured was inserted by him without instructions from them.

Under these circumstances, the rule of construction to which we have referred has a direct application.

It is insisted, however, that the words "estate of Daniel Ross" have a definite legal signification, meaning his administratrix, and that the policy is to be construed in the same manner as though she was named as the person assured thereby.

This position has some support in the remark of DENIO, Ch. J., in *Herkimer v. Rice*, to the effect that in common parlance and in legal language, when the estate of a deceased person is spoken of, the reference is to his effects in the hands of his executor or administrator. In that case the question was as to the right of the administrator and the creditors of the intestate on the one side, and the heirs upon the other, to certain money recovered upon policies of insurance upon the buildings on the land of the intestate, issued directly to the administrator or renewed upon her application. The renewal receipts stated the premium to have been received of the estate of the intestate. In fact the policies were renewed upon the application of and for the benefit of the administratrix and the creditors, and the court gave effect to the contract according to the intention of the parties.

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This case is not, we think, an authority for the claim made by the defendant. The words used in this policy were intended to designate the persons holding the legal title, and to speak of the property left by a deceased person, including the real property, especially before final settlement of his affairs, as his estate, if not an accurate, is not an unusual designation.

We are of opinion that the interests, both of the administratrix and of the heirs, in the insured property were covered by this policy. (1 Phil. on Ins., 106; *Higginson v. Dale*, 12 Mass., 96.)

It is claimed on the part of the defendant that the policy in question was issued upon an application and survey made in 1863 by Daniel Ross to the Home Insurance Company, for an insurance upon the same property covered by this policy, and that that application and survey, by the terms of the policy, were referred to and made a part of it, so as to bind the assured by the statements contained therein as warranties, except as they were modified by the indorsement made by the agent of the defendant.

In that application and survey, it was represented that there was but one building within one hundred feet of the mill. In fact, when the policy was issued, there was, and had been for some years, several buildings within that distance. There were other statements in the application and survey which were untrue as applied to the time when this policy was issued. If this survey was made a part of the contract, the policy never attached, as the truth of the statements in the application and survey was a condition precedent thereto. The court held that this application and survey was not a part of the policy, and excluded that question from the consideration of the jury.

In the printed part of the policy it is provided as follows:

"This policy is made and accepted in reference to the survey on file at this office and the conditions hereto annexed, which are to be used and resorted to in order to explain the



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rights and obligations of the parties hereto in all cases not herein otherwise especially provided for."

And one of the conditions referred to, after specifying what the application must contain, including among other things a specification of the situation of the property to be insured, with respect to contiguous buildings, declares "that if any survey, plan or description of the property herein insured is referred to in this policy, such survey, plan or description shall be deemed and taken to be a warranty on the part of the assured."

The attestation clause recites that the "Hope Insurance Company have caused these presents to be executed by their president and attested by their secretary, at their office in Providence, R. I."

It is apparent from these provisions, that it was the practice of the company to require a specific written application and survey, to be made by the applicant, to accompany his proposition for insurance, and that the survey referred to in the condition is the survey mentioned in the body of the policy as on file in the office of the company, and which was the basis of the contract of insurance.

The provision, however, requiring a written application by the person seeking insurance, was introduced for the benefit of the defendant, and if the company issued a policy without requiring it, the contract would take effect as though no reference thereto had been made.

In this case, no written application was made by the assured, nor was any application, relating to an insurance on this property, on file in the office of the defendant.

The application and survey made by Daniel Ross in 1863, which enumerated the articles of machinery in the mill, was, at the time of the insurance, in the possession of the agent of the defendant at Utica, where it had been from the time it was made.

In the part of the policy which describes the property insured, this survey is referred to as follows: "\$2,165 on

movable machinery therein, as per survey on file at office of M. H. Thomson, at Utica, N. Y."

This reference to the survey of 1863 cannot, we think, be regarded as the survey mentioned in the printed clauses of the policy.

It was a convenient method of identifying the articles of movable machinery covered by the policy, but it did not make the other statements therein a part of the contract.

This survey was not, and had not been, on file in the office of the defendant. Nor does the evidence in the case furnish any ground for the inference that the parties understood that the survey of 1863 was to stand as the application for this insurance. It does not appear that the assured had any knowledge of the statements it contained; nor are they chargeable with notice of them.

The parties could have made that survey, for all purposes, a part of the contract, but this intention is not apparent upon the face of the instrument, nor is it established by extrinsic proof.

The party to a contract who seeks to destroy its obligation by reason of an alleged breach of a condition precedent by the other party, cannot establish the existence of such a condition by inference or conjecture. The terms of the contract must be clear or explicit in his favor.

There was no error in the ruling of the court that the survey of 1863 was not a part of the contract between the parties.

It remains to consider the effect of the contract for the sale of the insured property, made by the assured after the policy was issued. When the insurance was effected the heirs of Daniel Ross were the absolute owners of the land, and had an insurable interest in the buildings thereon commensurate with their full value. They were insured as owners, and such premium was exacted by the defendants as was deemed equivalent to the risk assumed.

The contract of May 29, 1865, was an entire contract for the sale, for a gross sum, of the mill and the machinery

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therein. It was not obligatory upon the infant heirs, as no order for the sale of their estate had been procured, and their general guardian had no power to contract for the sale in their behalf. It did not become mutually obligatory until confirmed and approved by the court by the order of June 3.

The vendee took possession of the property immediately after the contract was executed under the provision therein giving him immediate possession, and declaring that he shall hold the land and personal property as tenant of the estate at a fixed rent, until the deed should be executed and delivered.

The vendee paid \$1,500 when the contract was executed, and remained in possession without any new contract, until the fire which destroyed the property.

It is now claimed on the part of the defendant, that by the contract of sale the vendee became the equitable owner of the land, and trustee for the vendors of the purchase-money, and that the contract of insurance became from that time an indemnity for the payment of the unpaid purchase-money, and a mere insurance of the debt owing to the vendors to the extent of the policy. It is then insisted that this relation between the parties to the contract of insurance, entitled the defendant, on payment of the loss, to be subrogated to the extent of such payment to the claim of the vendors for the purchase-money on the contract, and that the transaction in short was a complete execution of the contract of purchase, and extinguished the liability of the defendant on the policy. The general rule is, that the vendee in a contract for the sale of land, is entitled to any benefits or improvements happening to the land after the date of the contract, and must bear any losses by fire or otherwise, which occur without the fault of the vendor. (Dart on Vendors, 116; 1 Sug. on Vendors, 468; *Paine v. Miller*, 6 Ves., 349.) Nor, it seems, is he entitled to the benefit of an insurance obtained by the vendor on his own account, and held for his own benefit. (*Shotwell v. The Jefferson Ins. Co.*, 5 Bosw., 261; and see *Ins. Co. v. Updegraff*, 21 Pa. St., 513.)

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And in case of loss by fire, when such an insurance exists, it was said by the chancellor, in *Tyler v. Aetna Ins. Co.* (16 Wend., 385), in analogy to the rule in case of insurance upon the interest of a mortgagee, that the insurer, on payment of the loss, is entitled to be subrogated *pro tanto* to the rights of the insured in the unpaid purchase-money.

Without conceding the correctness of this doctrine, we think that this case is not within it. The contract of sale was entire. The value of the machinery and personal property formed the principal part of the purchase-money. The mill was useless, as such, without machinery; and it may be assumed that neither the real nor personal property would have been purchased separately.

The title to the personal property did not pass by the contract. By the agreement of the parties, the vendee, at the time of the fire, held it as tenant. When it was destroyed by the fire, it was the property of vendors in the contract, and the loss was theirs. (*Herring v. Hoppock*, 15 N. Y., 409; *Hasbrouck v. Lounsbury*, 26 N. Y., 599.)

They were disabled to perform the contract in respect to the personal property, nor could they, under the circumstances, compel the vendee to accept a partial performance on their part, and require him to take the land. (*Bacon v. Simpson*, 3 Mees. & W., 78.)

The same event, therefore, which fixed the liability of the defendant to pay the insurance, discharged the vendee from the obligation to pay the debt, to which the defendant claims to be subrogated. Manifestly there was then no right of subrogation. Nor can the transaction, in November, when the deed was delivered and the payment made, be regarded as an election by the vendee to perform the contract of May 29.

The payment was made, not alone in consideration of the delivery of the deed, but also of the assignment of the claims against the insurance companies. If, however, the contract of sale was in full force after the fire, the defendant was not entitled to subrogation to the claim of the vendors.

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The original undertaking by the defendant was an insurance of the owner's interest in the property.

By the contract of sale, the vendee agreed to repay the vendor the unearned portion of the premium on the policy in question, and to keep the premises insured for the protection of any mortgage he should give on the consummation of the sale.

The undertaking, by the vendee, to pay the cost of the insurance, was, under the circumstances, equivalent to an agreement on the part of the vendor, to hold the insurance for the protection of the joint interests of the parties, and created a privity between them in respect to the contracts of insurance. There can be no other reasonable construction of the transaction.

In substance, this insurance was furnished by the vendor as an additional security for his debt.

If, as between the parties to the contract of sale, the vendee was entitled to the benefit of the insurance moneys in case of loss, the defendant can assert no equity in hostility to that arrangement.

The equity of the defendant is the equity of the vendors; and an arrangement between the vendors and vendee, in respect to the application of the proceeds of the insurance, did not violate any contract between the insurer and insured.

The defendant, upon payment of the indemnity promised, simply performs his contract. (*Kernochan v. The N. Y. Bowers Fire Ins. Co.*, 17 N. Y., 428; *Insurance Co., v. Updegraff*, 21 Pa. St., 513.)

The judgment should be affirmed.

All concurring, judgment affirmed.

## JOHN W. THOMPSON et al., Respondents, v. THE ERIE RAILROAD COMPANY, Appellant.

A verified answer, which interposes a general denial to the complaint, is tantamount to a plea of the general issue under the former system of practice at law. Such answer gives to the defendant the right to require the plaintiff to establish by proof all the material facts necessary to show his right to a recovery. It cannot be stricken out as sham, although shown by affidavits to be false.

Where the answer contains a general denial of several allegations of the complaint.—*Held*, that as to those allegations, the answer is as fully a general denial as is an answer denying the whole complaint, a general denial of all its allegations. The allegations denied must be met by proof, and such proof must, in such a case, as well as in that of a general denial of the whole complaint, be the common-law proof, which the defendant has the constitutional right to require. And this rule is applicable, whether the complaint sets up a claim formerly cognizable by a court of law, or one entertained only in a court of equity.

The 247th section of the Code gives no power to order judgment upon a part of an answer as frivolous, where there is a part which is held good. If it is irrelevant, it may be stricken out as such, under section 152. And this relief may be granted on a motion for judgment for frivolousness, if there is a prayer in the notice of motion for "other or further relief." In an action by preferred stockholders against a corporation to compel the payment of a dividend alleged to be due, and charging that the funds applicable thereto have been diverted to the permanent improvements and additions of the road, the common stockholders may be proper, but are not necessary parties.

(Argued April 25th; decided May 23d, 1871.)

APPEAL from the judgment of the General Term of the Supreme Court of the Third department, affirming an order of the Special Term striking out part of an answer interposed by defendant as sham, and holding the rest of the answer frivolous, and directing judgment for the respondents.

This action was for the recovery of an undeclared dividend for the year 1869, upon preferred stock. The New York and Erie Railroad Company (the predecessor of the appellant), became bankrupt in 1859. It was largely indebted to mortgage creditors and others. By a contract between the stock-

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Statement of case.

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holders and creditors, it was arranged that the corporate property should be sold under foreclosure proceedings then pending; that the defendant should be organized as the successor of the old company; that the mortgage liens should be continued; that other creditors, on surrender of their evidences of indebtedness, should be entitled to an issue of preferred stock upon certain terms, among others, that the holders of such preferred stock should be entitled to a yearly dividend of seven per cent, out of the surplus net earnings, after paying certain interest and other specified sums. The contract was executed, and was ratified by the legislature. The plaintiffs claim as holders of certain shares of this preferred stock. This action is brought to enforce the declaration and payment of a dividend, under Laws of 1861, 213, section 4. The complaint, after allegations embodying the above statement, charges that the net earnings of the defendant during the year 1869, amounted to fully enough to pay to the holders of said preferred stock the dividends claimed. It charges that defendant has expended a large part of its net earnings for the year 1869, in permanent additions and improvements to its property, to the undue advantage of the holders of its common stock, and expended another large part in illegal investments and purchases. These three averments are respectively numbered in the complaint, "eleventh," "twelfth" and "thirteenth." The answer, for the first defence, denies each and every allegation contained in those paragraphs of the complaint, and avers that the affairs of the defendant are managed by seventeen directors, of whom no accounting has been asked respecting the matters set forth in the complaint. The second defence states that the claims of the plaintiffs are hostile to the interest of the common stockholders, claims that they should be represented in the action, and discloses the names of some of them, and the names of defendant's directors. The order under review condemns the first defence as sham, and the latter part of it as both sham and frivolous; and the second defence as frivolous.

## Statement of case.

*Thomas G. Shearman* ( *Wm. A. Beach* with him), for the appellant. No hindrances to a speedy trial will forfeit the right to a regular and statutory notice of trial and hearing. (*Lodewick v. Ford*, Ct. of Appeals.) The proposition to issue certificates for dividends payable in future has no binding force. (*Barnard v. Vt. and Mass. R. R. Co.*, 7 Allen, 512.) The declaration of a dividend is entirely within the discretion of the directors of a corporation. (*Brown v. Monmouthshire R.*, 4 E. L. & E., 113; *State of La. v. Bk. of La.*, 6 La., 745; *Ely v. Sprague*, Clarke, 351.) No action lies to compel a dividend. (*Jackson v. Newark Plank R. Co.*, 31 N. J., 277; *Kanes v. Genesee and Roch. R. R. Co.*, 4 Abb. N. S., 107; *Williston v. Mich. South. R. R. Co.*, 13 Allen, 400; *Barry v. Merch. Ex. Co.*, 1 Sandf. Ch., 280; *Luling v. Atlantic M. S. Co.*, 45 Barb., 510, 514.) The characters of creditor and stockholder cannot, under this act (Laws of 1862, p. 208) attach to the same subject-matter. (*Williston v. Mich. South. R. R. Co.*, 13 Allen, 400; *Taft v. Hartford and Fishkill R. R. Co.*, 8 R. L., 310; *Smith v. Chesapeake and O. C. Co.*, 14 Peters, 45.)

*James Emott*, for the respondents. Where there has been a failure to pay the dividends at the stipulated time, on account of a deficiency of earnings, the arrears of dividends must be paid from the first profits subsequently accruing (*Henry v. Great Northern Railroad Co.*, 27 Law J., 1-16; S. C., 4 Kay & Johns., 1-21; *Crawford v. North Eastern R. R. Co.*, 3 Kay & Johns., 741; *Matthews v. Great Northern R. R. Co.*, 28 Law J., 375; *Smith v. Cork and Bandon R. R. Co.*, 3 Irish [Eq.], N. S., 356; *Sturge v. Eastern Union R. R. Co.*, 7 De G. Macn. & Gord., 158; S. C., 31 Eng. L. & E., 406; *Stevens v. South Dover R. R. Co.*, 9 Hare., 313; S. C., 13 Beavan, 48.) The denial was by way of negative pregnant. (*Sherman v. N. Y. Central Mills*, 1 Abb., 1871; *King v. Ray*, 11 Paige, 235; *Davison v. Powell*, 16 How., 467.) Such a defect can only be reached by motion to strike out, under section 152 of the Code. (*Blake v. Eldred*, 18



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How., 240, 242; *Reed v. Latson*, 15 Barb., 9, 17.) In view of the evidence produced, and under all the circumstances of the case, the defendant was called upon to produce specific and definite information in relation to the account to entitle the answer to stand. (*People v. McComber*, 18 N. Y., 324; *Manuf. Bank v. Hitchcock*, 14 How., 406; *Bailey v. Lane*, 13 Abb., 354; *Walker v. Hewitt*, 11 How., 395, 400, citing many cases; *Agawam Bank v. Egerton*, 10 Bosw., 660; *Lawrence v. Derby*, 24 How., 133.) The defendant occupied toward the plaintiffs the relation of a trustee. (*N. Y. and N. H. R. R. Co. v. Schuyler*, 17 N. Y., 599; *Dodge v. Woolsey*, 18 How. U. S., 331.) The issue, therefore, attempted to be raised by the answer is frivolous. (*Manning v. Tyler*, 21 N. Y., 567; *Fairchild v. Ogdensburgh R. R. Co.*, 15 N. Y., 337; *St. Mark's Ins. Co. v. Harris*, 13 How., 95.) The new matter is frivolous. (*Bates v. Androscroggin R. R. Co.*, 49 Maine, 491; *Cramer v. Bird*, Law Rep. [Eq.], VI, 143, 148; *Hoole v. Great West. R. R. Co.*, Law Rep. [Chan. App.], III, 262-272.)

FOLGER, J. First. Had the Special Term the power to strike out the first defence set up in the answer as sham? A *sham* answer is one that is false, and these words, as applied to an answer, are synonymous. (*The People v. McComber*, 18 N. Y., 320.) A defence is sham, in the legal meaning of the term, which is so clearly false in fact that it does not in reality involve any matter of substantial litigation. (*Id.*) The first defence set up in the answer is of two parts. The second part avers that "the affairs of the defendant are managed by seventeen directors, and the plaintiffs have not asked from any of the said directors any accounting in respect to the matters set forth in the complaint." We find nothing in the papers which shows that this allegation is false.

It is undoubtedly true. It could not, therefore, be stricken out as sham. For although it may not involve any matter of substantial litigation, it is not because it is clearly false in

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fact. It will be noticed, however, as we progress, in its character as frivolous or irrelevant.

The first part of the first defence is a general denial of certain material allegations of the complaint.

We have held, in *Wayland v. Tyssen*, decided *Ante* p. 281, that a verified answer, which interposes a general denial to the complaint, is tantamount to a plea of the general issue under the former system of practice at law; that such answer gives to the defendant the right to require the plaintiff to establish by proof all the material facts necessary to show his right to a recovery; and that it cannot be stricken out as sham, although shown by affidavits to be false. "This was not upon the ground that a false plea was not sham, but upon the ground that a party, making a demand against another through legal proceedings, was required to show his right by common-law evidence, and that *ex parte* affidavits were not such evidence."

"When the general issue under the former practice was," and a general denial under the present practice is, "interposed as a defence, the party had," and has "a right, to a trial by jury, which is secured to him by the Constitution (art. 1, § 2)." In *Wayland v. Tyssen* the answer was a general denial of the whole complaint. In the case before us, the general denial of the answer is of but a portion of the complaint. Many of the averments of the complaint are admitted, there being no denial of them in the answer. The defendant, it would appear, did not seek to controvert them, and denied, as it might (Code, § 149), the material allegations of the complaint, which it did care to controvert. This section permits "a general \* \* \* denial of each material allegation of the complaint controverted by the defendant." As to those allegations thus denied, the answer is as fully a general denial as is an answer denying the whole complaint a general denial of all its allegations. It puts fully in issue the allegations which are denied, and demands of the plaintiff that he make proof of them. The whole stress of the controversy may be

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upon the truth of these allegations, and all other averments be no more material than as inducement.

The allegations denied may be so material as that, without establishing them, the plaintiff must entirely fail in his action. A general denial of but these allegations does then so stand in the way of the plaintiffs as that it must be met and overcome by proof. And such proof must in such case, as well as in that of a general denial of the whole complaint, be the common-law proof, which, as was held in *Wayland v. Tyssen*, the defendant has the constitutional right to require.

But it may be said that such is the case only in an action seeking relief, according to the rules of the common-law, as was the case above cited. And, indeed, it has been held (as in *Sheppard v. Steele*, 43 N. Y., 52), that in an action seeking relief according to the rules of equity, the provision of the Constitution above referred to does not apply. The right of a party to a trial by jury, as there guaranteed, is "in all cases in which it *has been heretofore used*." As courts of equity did not theretofore use the trial by jury, no right is violated when an action seeking relief from the equity power of the court is heard without the aid of a jury. But though the distinction is of necessity still kept up between equitable and legal grounds of claim or defence, they are administered upon by the same court, and in the same form of action, and with the same mode of pleading. And whether the complaint sets up a claim formerly cognizable by a court of law, or one entertained only in a court of equity, the answer follows the same form. The issue in the action is arrived at in the same mode of allegation. A general denial is the same in either case, and the same rules of practice must apply to it. If it is equivalent to a general issue and puts the plaintiff to the proof of his cause of action in the one case, it does in the other. And if it may not be stricken out as sham, because it is a general denial, in the one case, it may not in the other. And as in the one case, the general denial requires of the plaintiff a trial and the proof of his demand before a jury, so in the other, the

general denial requires of him a trial and the proof of his demand by the production of his witnesses before the proper tribunal in the presence of the defendant, subject to his power of cross-examination. In neither case can affidavits taken *ex parte* out of court determine the issue.

But it is claimed that the first part of the first defence of the answer is a denial by way of negative pregnant, and that such defect in an answer can only be reached by a motion, under section 152 of the Code, to strike out the denial as sham. If this were so (*i. e.*, if it were a negative pregnant), it is doubtful if the plaintiffs could object to it in this way. For the Code gives the right to the defendant to answer by a general denial of each material allegation controverted by him. A general denial of a complaint upon a promissory note, which averred making, indorsing, delivery, presentment for payment, protest and notice, is permissible. Could such a denial be correctly said to be by way of negative pregnant, because it might be, that though the note was not protested, still all other averments in regard to it were true? To require that such a denial should be stricken out as sham, as amounting to a negative pregnant, would be to take away the right to a general denial of any allegation averring more than one fact, and to exact of the defendant a specific denial of each allegation and of each part of every averment. The general denial of an answer has as wide a scope as the allegation of the complaint which it denies, and it puts in issue all which the plaintiff could be permitted to prove under his averment. If the plaintiff chooses to so broadly frame the allegation of his complaint, as that a general denial of it may still leave specifically undenied some part of the matter comprised in the whole of his allegation, he cannot take from the defendant his right of a general denial, and require him to specifically deny each part of the whole which the complaint has alleged. Moreover, it is difficult to see how a general denial can be correctly criticised as containing a negative pregnant. The instances given of it in the books do not show a general issue, but a special pleading negating some

avermment in the words of the averment, or some part of them, leaving without effectual traverse other parts of the averment. Thus, in trespass, for entering the plaintiff's house, the defendant pleaded a license from the plaintiff's daughter, to which the replication that the defendant did not enter by her license was before verdict bad as a negative pregnant, for it did not traverse the averment of the license, and was pregnant with the admission that there was a license. (1 Chitty Pl., 614, margin.)

But a general denial of the whole plea, had such pleading been permissible, would have put in issue the whole averment of the plea. And see *Wall v. Buffalo Water-works Co.* (18 N. Y., 119 and 124).

We are therefore of the opinion that the general denial of the first defence could not be stricken out as sham. The second part of the first defence set up in the answer is open to exception. The fact that the plaintiffs did not, before the commencement of their action, apply to any of the directors for an accounting, was not material or relevant. At the most, it could be of avail on the question of costs. And not proved by the plaintiffs, this would be as available upon this question as if pleaded and proven by the defendant. But if the plaintiffs establish the averments of the complaint, they will show the defendant in default; they will show that they had a rightful claim against the defendant which can be enforced by action. The maintenance of that action will not at all depend upon a prior demand of an accounting; for without either accounting or demand for it, it was incumbent upon the defendant and its directors to have made payment to the plaintiffs, and dereliction in that duty rendered the company liable to an action. (*Stacy v. Graham*, 14 N. Y., 492.) This part of the answer, though not false in fact, was so entirely immaterial as that it might have been stricken out as irrelevant under section 152 of the Code.

The court at Special Term having stricken out the first answer as sham, and holding the whole second answer frivolous, ordered judgment in the action for the plaintiffs under

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section 247 of the Code. If it had been right in striking out the general denial of the first answer as sham, it might have well taken this course; but as the general denial of the first answer must remain on the record as a good answer, demanding from the plaintiffs proof of the allegations put in issue, the court could not act upon the second answer as frivolous. It could not strike it out for that reason; for though so frivolous as to entitle the plaintiffs, if it stood alone, to judgment upon it, it cannot be stricken out, but must remain on the record. (*Briggs v. Bergen*, 23 N. Y., 162.) And the better opinion is that the 247th section of the Code gives no power to order judgment upon a part of an answer as frivolous where there is a part which is held good. But the plaintiffs, in their notice of motion to strike out as sham, and for judgment on the answer as frivolous, also asked for such other relief as may be proper.

We have held, in *The People ex rel. Johnson v. Supervisors of Delaware County* (*ante*, 196), that, under such a clause in the notice of motion, relief may be given other than that specifically asked for, and to such extent as is warranted by the facts plainly appearing in the papers on both sides. There is no reason why we may not apply this rule to this case. And though the second answer may not be stricken out as frivolous, nor may the plaintiff have judgment thereon, under section 247 of the Code, yet if it shall appear to be irrelevant it may be stricken out as such under section 152.

The substance of the first two paragraphs of the second defence set up in the answer is that the interests of the plaintiffs are adverse to those of the common stockholders of the Erie Railway Company, and that the action cannot properly proceed to trial without some of the common stockholders are made defendants in it. The plaintiffs cannot recover unless they prove that the net earnings of the company have been large enough to pay them a dividend, according to the agreement by which they became preferred stockholders. And they must establish this to the satisfaction of the court, as a matter of fact, and also as matter of law, in view of the ques-

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tions of construction of the agreement which are made. If the plaintiffs do establish this, the common stockholders can, in the eye of the law, have no interest adverse thereto. Then the only pretence can be that the directors, whom the common stockholders have placed in the charge of their property and interests, will not faithfully defend them against assault, and will not so resist the plaintiff's action as that the questions of fact and the questions of law shall be thoroughly tried.

There does not seem force enough in this consideration to justify a court in holding that an averment of such a fact coming from the directors themselves is relevant to the material issues in the action. If the common stockholders were before the court, by motion in their own behalf, asking to be made parties, and showing that the trustees of their own selection were likely to prove faithless to their trust, the question would have more weight.

The defendant has cited authorities to us, showing that in certain cases, where there are claims by one set of stockholders which will conflict with the interests of another set of stockholders, it may be proper that both sides of the case should be represented in court by some from each set. We do not understand these authorities to hold that this must in all cases be so, as an inflexible rule. It is a matter in which the court may exercise its discretion, as to who are necessary or proper parties, according as the facts and exigencies of each case appear. We see nothing in the facts of the case before us demanding the bringing in of common stockholders as parties defendant, or which gives warrant for the answer to that effect, or which will justify its interposition to the hindrance of the plaintiffs in their action. In our view, so much of the second defence of the answer may properly be held irrelevant, and may be stricken out as such.

The third paragraph of the second defence is also irrelevant. The plaintiffs allege, as a breach of duty of the defendant to them, that the persons in authorized control of its funds and affairs have diverted and appropriated part of its net earnings. They set up this as a cause of action against the defendant.

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If it is, it is no answer for the defendant to point out who those persons are. The plaintiffs have chosen to sue the defendant, who cannot, if the plaintiffs have good cause of action, shift them for redress over to others. If the plaintiffs have no cause of action, proof of the averment of the answer setting forth the names of these persons would not tend to establish that. The persons named are not necessary parties to the action. The plaintiffs are not bound to sue them, either in this action or in another against them. This paragraph in the answer seems utterly irrelevant.

Our conclusion is that the order of the General Term and the Special Term should be reversed, in so far as it strikes out the general denial of the first answer, and as it directs judgment for the plaintiffs in the action, and as it orders a reference to take and state an account; that it be modified so far as it holds the plaintiffs entitled to judgment on the second defence set up in the answer as frivolous, and so far as it strikes out the last paragraph of the first defence, and that an order be entered striking out those parts of the answer as irrelevant; and that except as thus modified or reversed the order of the General Term be affirmed, and that neither party have costs of this appeal as against the other.

All concurring, ordered accordingly.

RAPALLO, J., did not vote.

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SYLVESTER CAHILL et al., Appellants, v. COURTLANDT PALMER et al., Respondents.

A deed of certain real estate was given in 1760, the grantee, under it, dying in 1790, and leaving an heir proved to be in possession in 1806, claiming as heir, and who continued in possession until 1828. — *Held*, that, in 1867, the deed might be read in evidence, by such heir's grantee in possession, as an ancient deed, without proof of its execution.

Previous to the Revised Statutes, in order to establish a title founded upon adverse possession as against one holding the paper title, such possession must have been continued for twenty-five years; but proof of the



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possession of a cultivated farm in 1806, by one claiming as heir of one who died in 1790, which possession continued until in 1828; will authorize a presumption that such possession continued from 1790 to 1828.

Where the possession is actual, exclusive, open and notorious, under a claim of title adverse to any and all others for the time prescribed by statute, such possession establishes a title. To uphold it, a grant from the true owner to such party may be presumed.

(Argued April 24th; decided May 23d, 1871.)

APPEAL from the judgment of the General Term of the Supreme Court, first judicial district, affirming the judgment in favor of the defendants.

This was an action to recover money awarded by the commissioners of the Central park extension, to the defendant, Palmer, for land taken for that extension. The amount awarded was \$76,040. The plaintiffs claim five undivided eighths, in fee simple, of the land for which the award was made. The money having been awarded to Palmer, the plaintiffs brought suit against the mayor, etc., of New York and Palmer, to compel the payment to be made to plaintiffs if not made; and to recover it from Palmer, if he should have received it. The jury were directed to find a verdict for defendants. Palmer claimed to have been the owner of the property taken by the commissioners, and that he and his grantors had been in the actual possession of the premises for more than fifty years. The original grantor was one Kortright, in 1760, to one Sarah Nutter, who died in 1790, leaving son, Valentine, who was shown in possession in 1806, claiming by descent from his mother, and remained in possession up to 1828. The premises were shown in a state of cultivation in 1806. There was no direct proof of possession by Sarah Nutter, though the deed to her recites that she was then in possession. In 1828, the son, Nutter, conveyed the property in question to a canal company, who gave a mortgage, which was foreclosed, one Watt becoming the purchaser. Palmer obtained title through several intermediate grants, in 1860. No adverse claim had ever been asserted until the present action. The plaintiff's claim

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of title is based on a deed from one Cosse, who based his title upon a grant made by William Keift, the Dutch governor, dated May 9th, 1647, granting to one Johannes La Montange a piece of land claimed to embrace the property in question. Cosse claimed that he was one of the descendants of the original grantee, and that John Montange was another, and that he had acquired the interest of Montange by a deed dated May 21st, 1851.

*A. R. Dyett*, for the appellants. The plaintiffs can recover the money, notwithstanding the award of the commissioners. (Davies' Laws, 526; *Collins v. Mathewson*, N. Y. Gen. Term, 1866.) On the question of adverse possession, see *Doe v. Campbell* (10 John., 475); *Jackson v. Moore* (13 John., 513); *Simpson v. Downing* (23 Wend., 316); *Russell v. Wickham* (36 Barb., at page 369); *Jackson v. Frost* (5 Cow., 346); *Jackson v. Woodruff* (1 Cow., 286); *Laverty v. Moore* (33 N. Y., 658). The plaintiffs claim, under a grant from the State; forty years' adverse possession must be shown. (Code, §§ 75, 76; *People v. Arnold*, 4 Comst., 508; 8 Wend., 183; 17 Wend., 312; 2 John. Cas., 283.) Actual seizin continues, although the land is left vacant. (*Fosgate v. Herkimer M. Co.*, 9 Barb., 287; 4 Mass., 416; *Rossell v. Wickham*, 36 Barb., 390.) Adverse possession does not enter into this case. (*Jackson v. Dumont*, 9 John., 55; 21 Wend., 90; *Livingston v. Proseus*, 2 Hill, 526; 17 Barb., 663; 7 Wend., 53; 13 John., 466; *Crary v. Goodman*, 22 N. Y., 170; *Fish v. Fish*, 39 Barb., 513; 33 N. Y., 658.)

*John E. Burrill*, for the respondents. On the question of descent under the Dutch law, 4 Kent's Com., 381, 399; Vanderlinden's Laws of Holland, 157; Vanderlewen, Roman Dutch Law, 30, 207, 227. On the question of Nutter's possession, *Smith v. Lorillard* (10 Johns., 347); *Stocker v. Barney* (1 Lord Raym., 741); *Dunn v. Barnard* (Cowp., 595); Adams on Ejectment, 77, 78; *Fosgate v. Herkimer Co.* (9 Barb., 287). The plaintiffs should have requested

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that the case be submitted to the jury, and not having done so, are estopped. (*Downs v. Rush*, 28 Barb., 157; *Plumb v. Catt. Mut. Ins. Co.*, 18 N. Y., 392, 558; *Graser v. Stillwager*, 25 N. Y., 318; *Brown v. Bowen*, 30 N. Y., 536; *Story v. Brennman*, 15 N. Y., 524.)

GROVER, J. The plaintiff claims in this action to recover a portion of the money paid by the city to the respondent, as a compensation for lands taken by the city for the Central park. These lands were taken under the act of 1859, chap. 101, and of 1853, chap. 616. These acts make the act providing for the taking of land for streets by the city, applicable to lands taken for the park, in respect to the right of recovery, by the true owner of land taken, of money which has been awarded and paid to another for such land. The latter act (§ 184 Davies Laws of New York), relative to the city, 538, provides that in all, each and every case when any sum or sums or compensation so to be reported by the said commissioners in favor of any person, etc., whether named or not named in the said report, shall be paid to any person or persons or party or parties whomsoever, when the same shall of right belong and ought to have been paid to some other person or persons or party or parties, it shall be lawful for the person, etc., to whom the same ought to have been paid, to sue for and recover the same with lawful interest and costs of suit, as so much money had and received to his use, by the person or persons, etc., respectively, to whom the same shall have been so paid. It follows that if the respondent, to whom the money was awarded and paid as compensation for the land, was not the owner thereof, but the appellant was such owner of the whole or any part thereof, he can maintain this action for the recovery of such portion of the money as his interest in the land entitled him to receive, notwithstanding the award of the commissioners giving it to the respondent. The question, therefore, is whether the appellant showed title to the whole or any portion of the land for which the money was awarded and paid to the respondent.

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Opinion of the Court, per GROVER, J.

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I shall assume, in the consideration of this question, that the lands in question were shown to have been included in the patent given by William Kieft, Director General of the New Netherlands, in May, 1747, to Johannes Montange, and that the latter there acquired a valid title thereto under the patent, although the question is involved in much uncertainty from the defective description, other than that the lands conveyed were occupied by Hendrick Foreest, deceased. From the great lapse of time, no aid in locating the lands could be derived from this clause, as all trace of any occupancy of Foreest has long since been lost. I shall further assume that there was evidence to show that James A. Cosse, who gave a conveyance of the land, together with other land in 1862, to the plaintiff, and his grantor, John Montange, was a descendant of the patentee sufficient to require the submission of the question to the jury. Assuming that the jury would have found in favor of the plaintiff upon these questions, as we must, as the judge refused to submit them to the jury, it follows that the plaintiff showed a right to some part of the land as the grantor of two of the heirs of the patentee, and therefore a *prima facie* right to recover some portion of the money paid by the city to the defendant therefor. This brings us to the question whether the defendant showed title in fee to the land in himself. The case contains no evidence as to any occupancy of the land or in any way affecting the title until the year 1760, when a deed claimed to include the premises was given by Lawrence Kortwright to Sarah Nutter. This deed recites that Sarah Nutter was then in possession, and that Kortwright had lately been in possession of the land. This deed was excepted to as evidence by the plaintiff, but was received without proof of its execution as an ancient deed. No direct proof was given of an actual possession by Sarah Nutter, but it was proved that she died about the year 1790, leaving her son, Valentine Nutter, her only heir, and that Valentine Nutter was in possession of the land, cultivating it as a farm, having surrounded it with a substantial fence, residing thereon, claiming

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Opinion of the Court, per GROVER, J.

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to own it as heir of his mother under this deed from Kortwright as far back as 1806, which was as far back as the memory of witnesses residing in the neighborhood extended; but from the testimony of the situation of the farm improvements thereon in 1806, it was rendered highly probable that it had been occupied for a long time before, and cultivated as a farm probably by Valentine Nutter from the death of his mother in 1790, and by her previous to her death, after the deed from Kortwright to her. This proof of possession under the Kortwright deed was sufficient to authorize its being read in evidence without proof of its execution. The plaintiff proved by a surveyor that he could not locate the lands described in the deed from the description upon the lands in question. This may well be true, and yet not at all tend to show that such lands were not embraced therein. The witness could not avail himself of that important part of the description, which states that the land had lately been in possession of Kortwright, and was then in possession of Sarah Nutter, the grantee. What particular land they were in possession of nearly a century before the trial could not be proved, nor could it be known to the surveyor. The facts that Valentine Nutter, sixty years before the trial, was in the undisputed possession of the land, claiming to own the same by descent from his mother, under this deed; that such possession and claim were unchallenged by any adverse claimant, and that, from the facts proved, it was probable that possession had been held under the deed from the time it was given, when the facts were known, were stronger evidence that the land so possessed and claimed was included in the deed, than was the inability of the surveyor so to locate as to include the land after the lapse of nearly a century, that it was not so included. The testimony proved beyond question that Valentine Nutter was in the exclusive possession, claiming to be the absolute owner by descent from his mother, founding his title upon this deed of the farm, embracing this land, from 1806 down to 1828, when he conveyed a piece of the farm, embracing the land in ques-

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tion, to the Harlem Canal Company, receiving back a purchase-money mortgage, which was afterward foreclosed in equity, and the land sold upon the decree and purchased by Watt, to whom it was conveyed by the master; and that the defendant, through several conveyances, acquired this title in May, 1860. It thus appears that if title was shown in Valentine Nutter, the defendant was the owner of the land, and entitled to the money received by him. But the adverse possession of Nutter was before the Revised Statutes were enacted. At that time to establish a title founded upon adverse possession, as against one holding the paper title, such possession must have been continued for twenty-five years, (*McCormick v. Barnum*, 10 Wend., 104; *Simpson v. Downing*, 23 id., 316.) In the present case the direct evidence of possession by Valentine Nutter of the land in question was only from 1806 to 1828, a period of only twenty-two years. This would not establish title against those having the paper title, although the land has been claimed ever since 1828 by those deriving title from Nutter, through deeds; yet there does not appear to have been any actual possession by those holding this title. This time cannot be added cumulatively to the possession of Nutter to complete the twenty-five years. But we have seen that there was strong circumstantial evidence tending to show that the possession of Nutter, under an exclusive claim of title, founded upon the Kortwright deed, commenced long anterior to 1806, and reached back to 1790, the time of the death of his mother. The judge was right in giving effect to this circumstantial evidence after so great a lapse of time, and holding that an adverse possession in Nutter for more than twenty-five years was shown. The counsel for the appellant insists that an adverse possession, although for the length of time required by statute to bar the true owner, is available only as defence to a suit brought by such owner for the recovery of the land. In this the counsel is in error. When the possession is actual, exclusive, open and notorious, under a claim of title adverse to any and all other for the time prescribed by statute, such

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possession establishes a title. To uphold it, a grant from the true owner to such party may be presumed. (Washburn on Real Property, vol. 3, 135 to 142 inclusive, and cases cited; *Stevens v. Tuft*, 11 Gray, 35.) In the present case such presumption was peculiarly appropriate. The land was a valuable farm. It was inclosed and occupied as such probably for nearly a century, under a claim of title adverse to that of the Montange heirs. They interposed no claim whatever. The presumption is, that their title had been acquired by those in possession claiming the title. There was never any abandonment of this title. Although there has not been an actual occupancy by those holding the title, yet there has been a constant claim of title, under a regular chain of deeds from Nutter, to the time the land was taken by the city. The judge was therefore right in directing a verdict for the defendant, upon the ground, that he had shown a good title to the land, and the judgment of the General Term, affirming the judgment rendered upon the verdict, must be affirmed, with costs.

All concurring, judgment affirmed. ✓

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CHARLES F. WALLMAN, Respondent, v. THE SOCIETY OF CONCORD, Appellants.

The extension of the time for the performance of a contract, is not performance. And where an action is brought to recover the contract price, the plaintiff must show performance by himself of the modified contract, or that performance was excused, in the same manner as if the action had been brought solely upon the original agreement.

A contract was entered into for the building of an organ, to be paid for when completed. The vendee advanced money to the vendor, to secure the payment of which a mortgage was given on the unfinished instrument, payable on demand. Default having been made, the organ was sold by the vendee under the mortgage.—*Held*, that by enforcing the contract upon which the money had been advanced, the vendee did not prevent performance by the vendor, so as to authorize a recovery of the price by the latter.

(Argued April 19th; decided May 23d, 1871.)

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Opinion of the Court, per ANDREWS, J.

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APPEAL from the judgment of the late General Term of the Supreme Court, in the fifth judicial district, affirming the judgment in favor of the plaintiff, upon a verdict.

The action was to recover \$3,000 claimed to be due the plaintiff, under a contract to build an organ for the defendant, a religious society. The plaintiff was a musical instrument maker, and made a contract with the defendant, represented by one Falker, their president, to build an organ in their synagogue to be finished at a fixed day. The plaintiff mortgaged the organ to the defendant in an unfinished condition as security for advances made by them or their president, to enable him to go on with the building of it. The organ was sold unfinished by the defendant, under the mortgage, and the plaintiff claimed that by this act of the defendant he was prevented from finishing the organ. In fact, the plaintiff himself, under the direction of the purchaser at the foreclosure, took possession after the sale. He sued for the price, and for extra work. The original time for completion was shown to have been extended by parol. The other facts are sufficiently stated in the opinion of the court.

*W. C. Ruger*, for the appellant.

*D. Pratt*, for the respondents. Default might be waived by defendant, and the time extended for performance. (*Delacroix v. Buckley*, 13 Wend., 71; *Smith v. Gugerty*, 4 Barb., 614; *Lattermore v. Harson*, 14 Johns., 330; *Jewell v. Schroepfel*, 4 Cow., 564; *Dubois v. D. & H. Canal Co.*, 4 Wend., 285.) When it becomes material to ascertain the purpose for which an instrument was given, it may be shown by parol. (*Hutchins v. Hibbard*, 34 N. Y., 24; *Murray v. Walker*, 31 N. Y., 399; *Truscott v. King*, 6 N. Y., 147; *Chester v. Bank of Kingston*, 16 N. Y., 336; *Agawam Bank v. Streever*, 18 N. Y., 502.)

ANDREWS, J. It was incumbent upon the plaintiff, before he could recover the price of the organ, to show that he had performed the contract on his part, or that such performance had been waived or prevented by the defendant.



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Opinion of the Court, per ANDREWS, J.

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We deem it unnecessary to consider whether Falker had authority, as the agent for the defendant, to agree upon any modification of the terms of the original contract; or, if no original authority existed, whether the society ratified his assumed authority in that respect, so as to be bound by his acts.

We shall assume that the time for the performance of the contract was enlarged by an agreement binding upon the defendant, and that extra work was performed for which the plaintiff, if entitled to recover in the action, could claim additional compensation.

But an extension of the time for performance was not performance; and the plaintiff, in order to recover, was required to show a performance, by him, of the contract as modified, or that performance was excused in the same manner as if the action had been solely upon the original agreement.

It is clear, upon the evidence, that the organ was unfinished when it was taken from the synagogue of the defendant in July, 1865, by the plaintiff, acting as the agent for the purchaser on the foreclosure sale, and that it never, subsequently, came to the possession of the defendant.

The plaintiff acted upon the assumption that the title to the instrument was changed by that sale, and he took charge of and completed it as the agent for the purchaser.

If the consideration of the mortgage given to August Falker was money advanced by the society, and not by the mortgagee, the mortgage was nevertheless valid.

As to the plaintiff, it was founded upon a valuable consideration.

Whether August Falker held it for his own benefit or for the society, was a question between those parties, and in which the plaintiff had no interest.

The form of the security was assented to by the officers of the society, and the society ratified the transaction.

There is no foundation in the evidence for the assumption that the mortgages were given upon any oral agreement or understanding at variance with their legal effect.

In the view of the evidence most favorable to the plain-

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Opinion of the Court, per ANDREWS, J.

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tiff, they were not given for money received by him as payment upon the contract, but in consideration of money advanced by the society upon his application, to enable him to finish the instrument, and upon his agreement to give security thereon by mortgage.

It is not improbable that the defendant, if the organ had been completed, would have allowed the money advanced to be applied upon the purchase-money, but no such agreement was made. The defendant was under no obligation to pay any part of the purchase-money until the organ was completed. Treating both mortgages as if made to the defendant, the case then is this: The plaintiff agreed to build an organ, to be paid for when completed; the vendee advanced money to enable him to finish it, to secure which the plaintiff gave mortgages on the unfinished instrument, payable at a specified time, or on demand; and default having been made in the condition of the mortgages, and the organ having been sold upon them, the plaintiff is allowed to recover on the contract to build it, as though it had been performed, on the ground that the defendant, by enforcing the contract on which the money was advanced, prevented performance by the plaintiff, and enabled a third person to acquire title to the property.

This recovery cannot be supported. The title to the organ, when the mortgages were given, was in the plaintiff. If, before this, he had sold it, or it had been taken on execution against him, the defendant could not have interfered.

The plaintiff, to procure means to enable him to perform his contract, made a conditional sale to the defendant; that his interest in the property might be wholly divested by his default, and the execution of the power of sale contained in the mortgage was a result contemplated by the parties and provided for by the contract.

The defendant had a legal claim for the reimbursement of the money advanced, when the debt became due. If the plaintiff had performed his promise to pay it, he would have been reinvested with the legal title to the organ, and upon

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completing it, could have recovered of the defendant the compensation to which the contract entitled him.

To say that the defendant prevented performance, in any sense applicable to this case, by enforcing the mortgage security, is a misapplication of terms. The defendant did no more than the law and the contract authorized.

If the plaintiff has suffered loss, it is attributable to his own act or neglect, and not to any violation of legal duty on the part of the defendant.

The exception taken to the charge of the court raised the question we have considered, and the judgment should be reversed and a new trial granted.

All concurring, judgment reversed and new trial granted.

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WILLIAM NELSON, JR., et al., Appellants, v. FREDERICK H. ODIOERNE, Respondent.

A charter party provided that a full cargo under deck should be furnished by the charterer. It further provided that the cargo should be delivered and received on board, as customary, at the place of delivery; and if any lighterage was necessary, it was to be paid by the charterer.—*Held*, in an action by the owner against the charterer to recover full freight, that the contract to provide a full cargo was not performed, by the charterer furnishing coal at a wharf, where, by reason of insufficiency of water, the vessel could not take on a full cargo, but where it was practicable to complete the cargo by lighters; and that the fact that the "customary" way of loading at that place was at the wharf, did not relieve the charterer from his obligation to provide lighterage.

(Argued April 20; decided May 23d, 1871.)

APPEAL from a judgment of the General Term of the Supreme Court, in the first judicial district, affirming a judgment, entered on the verdict of a jury, in favor of defendant.

The action was brought upon the alleged breach of a charter party, made between the parties on the 21st of October, 1864, by the terms of which the plaintiffs chartered the ship J. P. Wheeler to the defendant, for a voyage from Cow Bay to New York, with a cargo of coal to be

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Opinion of the Court, per ANDREWS, J.

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furnished by the defendant. The defendant agreed to furnish a full cargo of coal for the vessel, and to pay freight at the rate of \$7.50 per ton of 2,240 pounds. The defendant guaranteed eighteen feet of water at Cow Bay, and the agreement also provided that vessels of greater draught were to be loaded under the regulations of the mining company. It was further agreed that the cargo should be delivered and received on board as customary at Cow Bay, and if any light-erage should be necessary, it should be paid by the charterer. A full cargo for the ship was 1,250 tons; 1,029 tons were furnished while the ship lay at the wharf of the company, when, by reason of the insufficiency of water, the ship was obliged to haul off from the wharf. Plaintiff claimed that there was not eighteen feet of water at Cow Bay. The ship struck several times on the bottom, causing great damage. Lighters were refused, by means of which the cargo might have been completed. There were lighters in the bay. The ship finally sailed with only 1,029 tons on board. When fully loaded, the ship's draught of water was twenty feet and six inches; in ballast, fourteen feet; half loaded, sixteen and a half feet aft and sixteen feet forward; with the cargo she had on, she drew seventeen and a quarter feet. By the measurement of Capt. Ladd (commanding the ship), the water at Cow Bay, at the wharf, was at low water twelve and a half feet, and at high water seventeen and a half feet.

*John H. Reynolds*, for the appellant.

*Henry H. Anderson*, for the respondent.

ANDREWS, J. The right of the plaintiffs to recover freight, not only for the coal actually carried, but for what might have been carried, if the vessel had taken a full cargo, depends upon the construction of the charter party, and the respective obligations of the parties created thereby.

In general, where the charterer hires the whole tonnage carrying capacity of a vessel, it is in the nature of a con-

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Opinion of the Court, per ANDREWS, J.

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tract, whereby the owner agrees to carry a cargo which the charterer agrees to furnish. And if the charterer hires the whole burden of the vessel, under an express or implied agreement to load it with a full cargo, at a certain freight, and fails to provide it, he is liable, if the owner is not in default, to the same extent, as if he had furnished it. (1 Par. on Mer. Law, 232, 242; *Duffin v. Hayes*, 15 J., 326.)

If, however, the charterer hires the entire ship, and is to pay a certain price per ton for such goods as he shall put upon it, and there is no express or implied covenant to load it as full, then the owner can only recover freight upon the goods shipped. (Abbott on Shipping, 412, and cases cited.)

The plaintiff, by the charter party, upon which this action was brought, covenanted that the vessel should proceed on a voyage from New York to Cow Bay, N. B., and there receive on board coal to be transported to New York.

The defendant, on his part, engaged to provide and furnish to the vessel a full cargo of coal, under deck, and to pay to the plaintiff for the transportation a specified rate per ton.

He also guaranteed that there was a depth of eighteen feet of water at Cow Bay; and the contract provided that vessels of greater draft should be loaded under the regulations of the mining company at the Block House mine.

The tonnage of the vessel was stated in the charter party, and it was proved that she could carry, under deck, 1,300 tons of coal, and that when fully loaded her draft exceeded twenty-one feet.

The vessel proceeded on her voyage, and took on at the wharf of the mining company at Cow Bay, 1,050 tons or thereabout of coal; and the testimony, on the part of the plaintiff, tended to show that the depth of the water at the wharf would not admit of more to be taken there.

The plaintiff sought to establish a breach of the warranty as to the depth of water at Cow Bay; and, upon this subject, there was conflicting evidence. But it is unnecessary, in the view we take of the case, to consider the question raised upon this provision in the contract.

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The master of the vessel, after loading what could be taken at the wharf, took his vessel into deeper water and anchored, and then called upon the mining company to procure lighters, and complete the lading of the vessel; and this method was practicable. The company refused to furnish lighters or to hire schooners for this purpose, although the latter might have been procured.

We will now refer to another provision of the charter party upon which this controversy mainly turns.

After the clauses to which we have referred, it proceeds as follows: "It is further agreed that the cargo shall be delivered and received on board, as customary, at Cow Bay, and if any lighterage is necessary, it must be paid by the charterer."

It appeared in proof that it was customary for the mining company, at the time this contract was made, to load coal into vessels from their wharf, and that the practice of using lighters for this purpose had been discontinued; and that the company had, at the time, coal at the wharf sufficient to load the vessel in full, and were ready to deliver it there to the extent required.

The court charged the jury, in substance, that the defendant had performed his contract, when coal was furnished at the wharf in the customary manner, and was not bound to provide lighters or to complete the loading of the vessel elsewhere; and to this part of the charge the counsel for the plaintiffs excepted.

The draft of the plaintiffs' vessel when loaded was known to, or might have been ascertained by, the parties, when the contract of affreightment was made.

The defendant must be held to have known at that time that a depth of eighteen feet of water at the wharf of the mining company was insufficient to enable the vessel to take a full cargo at that point.

He engaged, however, as we have seen, to "provide and furnish" the vessel with a full cargo, which the plaintiffs, on their part, agreed to "receive on board."

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This provision was plainly for the benefit of the plaintiffs, who were interested in securing the full freight which the carrying capacity of the vessel would allow.

The provision in the contract, that vessels of greater draft than eighteen feet should be loaded under the regulations of the mining company, indicates that the parties contemplated that vessels drawing more water than the depth guaranteed at Cow Bay, might nevertheless be provided with a cargo.

If the defendant contracted to furnish a full cargo, he would not be excused from performance, although performance was difficult, or even impossible.

The duty was brought upon him by his own act, and he must discharge it or become liable, as upon a breach of the contract. (*Oakley v. Morton*, 11 N. Y., 25; *Harmony v. Bingham*, 12 id., 99.)

It is claimed, however, that the part of the contract, wherein the defendant stipulates to furnish a full cargo, is qualified by the subsequent clause providing that the coal shall be delivered and received on board the vessel, "as customary," at Cow Bay; and as no custom to load by the use of lighters or otherwise than at the wharf existed at the time, the defendants were not bound to furnish them.

This argument overlooks the remainder of the same clause, which declares that "if lighterage shall be necessary, it must be paid by the charterer," and which very clearly implies that it might be necessary to adopt that method of delivering the cargo.

In short, there was no custom beyond that which regulated the delivery to vessels, which could be loaded at the wharf. True, the defendant contracted to furnish to the plaintiff a full cargo, and if lighterage was necessary in order to do it, to furnish it at their expense.

It is a familiar rule in the interpretation of contracts that the general article is not to be set aside upon doubtful words, and that the separate clauses, unless plainly inconsistent, are to be construed in aid of and not in contravention of the main

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purpose and intent of the parties appearing in the instrument. (*Parkhurst v. Smith*, Willes, 332.)

The part of the charge alluded to was erroneous, and a new trial should be granted.

Ch. J., ALLEN, FOLGEE and RAPALLO, JJ., concur. GROVER, J., does not vote. PECKHAM, J., does not sit.

New trial granted.

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AARON BORDWELL, Respondent, v. SAMUEL D. COLLIE,  
Appellant.

The owner of a chattel, having mortgaged it, afterward transferred it to the defendant, who sold to D., who sold to the plaintiff, who himself sold to one S., all the successive vendees purchasing without knowledge of the mortgage. The mortgagee having demanded the property of S., he yielded it up without litigation, and received back from the plaintiff the price paid to him, who, on application to D., his vendor, received an assignment of his claim against the defendant. In the action brought by the plaintiff to recover of the defendant the price he had paid,—*Held*, that the failure to litigate the title either by the plaintiff or his vendee, was no defence, and that such last purchaser properly restored the property without compelling the mortgagee to resort to judicial proceedings to establish his claim.—*Held*, also, that although plaintiff had no cause of action directly against the defendant, he could sue as assignee of D., and that D. assigned a good cause of action.

Where personal property is sold with an express or implied warranty of title, the rule is the same as to eviction as upon a covenant for quiet enjoyment in deeds of real estate. A party, however, holding under a covenant for quiet enjoyment, when evicted, may maintain an action against his immediate vendor, or may, at his election, proceed against a remote grantor, who has conveyed the land with similar covenants. In the case of personal property, the vendee can only resort to his immediate vendor, as there is no privity of contract between the last vendee and a remote vendor.

(Argued April 17th; decided May 23d, 1871.)

APPEAL from the judgment of the late General Term of the Supreme Court, in the eighth judicial district, affirming the judgment upon a verdict at the Erie Circuit in favor of the plaintiff. (Reported below, in 1 Lans., 141.)

In November, 1866, Charles Richter was the owner of a horse, upon which, together with other personal property, he



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Opinion of the Court, per GROVER, J.

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gave a mortgage to one Sonnick, which was duly filed. Subsequently, Sonnick assigned the mortgage to one Stillwagen. In 1867, Richter sold the horse to the defendant, he to one Douglass, he to the plaintiff and the plaintiff to one Smith. While the horse was in Smith's possession, the assignee of the mortgage took the horse from Smith, who yielded possession to him without suit. The mortgage was due and unpaid; each vendor was in possession of the property at the time it was sold by each, and all acted in good faith except Richter. Smith, after giving up possession of the horse, demanded the money he had paid the plaintiff, which the latter paid him. The plaintiff then demanded payment from Douglass, his vendor, and Douglass, to satisfy this claim, assigned his claim against the defendant. This assigned claim the defendant refused to recognize, and the plaintiff brought this action. A motion to nonsuit, made by the defendant, was refused.

*George Wadsworth*, for the appellant, cited *Bruff v. Mali* (34 How., 338, 343); *Case v. Hall* (24 Wend., 102); *Vibbard v. Johnson* (19 John., 77); *Livingston v. Bain* (10 Wend., 384); *Blasdale v. Babcock* (1 John., 516); *Barney v. Dewey* (13 John., 224); *Ross on Vendors*, 334; *Delaware Bank v. Jarvis* (20 N. Y., 226).

*William H. Gurney*, for the respondent, cited *Greenvault v. Davis* (4 Hill, 643); *St. John v. Palmer* (5 Hill, 599); *Fowler v. Poling* (6 Barb., 165); *Hamilton v. Cutts* (4 Mass., 349); *Sweetman v. Prince* (26 N. Y., 224); *Burt v. Dewey* (40 N. Y., 283).

GROVER, J. The ground on which the motion for a nonsuit was made, was that the validity of the lien of the chattel mortgage upon the horse had not been established by judicial proceedings. If this was necessary, the judge erred in not granting the motion, as the evidence was that the vendee of the plaintiff gave up the horse to the assignee of the mortgage when demanded, upon being satisfied that the lien was

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valid against the title acquired by the purchaser. While the latter retained possession of the horse under the title acquired by his purchase from the plaintiff, he had no cause of action for the breach of the implied warranty of title, although able to prove that no title, whatever, was acquired thereby. (*Case v. Hall*, 24 Wend., 102.) The rule, when the vendor fraudulently represents that he has title, is different. In the latter case, an action to recover damages for the deceit will lie, although there has been no disturbance of the possession. (Same case and cases cited.) The rule in cases of warranty, express or implied, was derived from the analogy to that adopted in cases of covenants of quiet enjoyment in conveyances of real estate. (See case, *supra*.) An eviction is an essential prerequisite to a recovery in the latter class of cases. Yet this need not be by process of law. It is enough that on a valid claim made by a third person, under title paramount, the plaintiff voluntarily yielded up the possession. If this is done without legal contest, the plaintiff must prove that the title to which he yielded, was paramount to that acquired by him under his deed from the defendant. (*Greenvault v. Davis*, 4 Hill., 643; *St. John v. Palmer*, 5th id., 591.) The rule adopted in these cases has been regarded since as the law of the State, and as such applied to like cases. Actions for a breach of warranty, express or implied, upon a sale of personal property, we have seen are within the same principle, in this respect, and require the application of the same rule. To hold that a purchaser of personal property must become a wrong-doer by withholding it from the true owner, and compel him to resort to an action for its recovery, to entitle him to redress for a breach of warranty of title, would be absurd. Such a rule cannot be supported by reason, or sound policy. It must stand only upon authority, if at all. But there is no well considered case holding any such doctrine. In *Rew v. Barber* (3 Cowen, 272), an action for breach of warranty of title was sustained, where the property had been taken from the purchaser by the sheriff, under a levy made previous to the sale. That differs in no respect in principle

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from the present ease. The sheriff, by his levy, acquired, a property in the goods for the purpose of satisfying the execution. This was nothing more than a title paramount to the judgment debtor. The sheriff had the right to reduce the property to his possession wherever he could find it. This is the right, also, of any owner of personal property. The fact that the former may use force in the recaption of the property, if necessary, while the latter may not, but must resort to his legal remedy, if unable to get possession personally, does not affect the question. The title is no more determined judicially when taken by the sheriff, than it is when taken by any other owner. In *Sweetman v. Prince* (26 N. Y., 224), and in *Burt v. Dewy* (40 id., 283), the judges, who delivered opinions, declared that a recovery might be had against his vendor, by a party upon a breach of warranty of title, who had surrendered possession to the true owner upon demand, but that in such case he must prove that the title of such owner was paramount to that of his vendor. Although it was unnecessary to determine the question in either case, and the cases cannot, therefore, be considered as authority, yet the opinions of the learned judges should be considered in determining the question. My conclusion upon both reason and authority is that the law was correctly laid down in these opinions. It follows that the plaintiff's vendee was entitled to recover of him upon the implied warranty after surrendering the horse to the assignee of the mortgage, and that when the plaintiff had paid his vendee, he had a right of action against his vendor. But the defendant did not sell the horse to the plaintiff, but to Douglass, who sold to the plaintiff. The counsel for the appellant was right in the position that there was no privity of contract between the plaintiff and defendant, and that, therefore, upon the above facts, the latter could not maintain an action against the former. He could proceed only against Douglass, his immediate vendor, between whom and himself such privity did exist. In this respect, the analogy between a warranty of title, express or implied, upon a sale of personal

property, and a covenant of quiet enjoyment in a conveyance of real estate, fails. In the latter, a party, when evicted, may maintain an action against his immediate vendor, but he is not obliged to resort to him, but may proceed against a remote grantor, who has conveyed the land with a similar covenant. But this is for the reason that covenants as to title run with the land, and enure to the benefit of all acquiring the same title to the land. Not so in respect to a warranty upon the sale of personal property. That does not go to a subsequent purchaser. The plaintiff must, therefore, if he maintains the action at all, do so as the assignee of Douglass. But it is insisted by the counsel for the defendant that Douglass had no cause of action against the defendant until he had paid the plaintiff or satisfied him in some way for his claim against him; and that, not having done so, nothing passed to the plaintiff, under the assignment of Douglass to him of his demand against the defendant, founded upon the breach of warranty upon the sale by the latter to Douglass. This position is specious, but is it sound? Douglass, upon satisfying the plaintiff for his damages in any way, would have the right to recover of the defendant either the price paid by him for the horse, or his value at the time of the sale, irrespective of the amount paid by him to the plaintiff. It is not material in the present case to determine whether the price paid or the value of the horse was the measure of damages, as that question was not raised upon the trial. From the facts found, it appears that the plaintiff had a valid claim against Douglass; that he called upon him for payment, and that he proposed to assign to him his claim against the defendant in satisfaction of the claim of the plaintiff against him, and that the plaintiff agreed to, and did take the assignment upon these terms. We have already seen that the cause of action of Douglass against the defendant would become perfect when he had satisfied the claim of the plaintiff against him. Then he could either prosecute the defendant himself or transfer the cause of action to another. I am unable to see any reason why he might not satisfy the claim of the plaintiff

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against him and transfer the cause of action thereby created against the defendant by one and the same act. That is precisely what was done in the present case. The objection is founded upon the merest form, having no bearing upon the substantial rights of the parties. But the counsel says that Douglass must actually pay the plaintiff's claim before he has any cause of action against the defendant. This, in substance, he did by the assignment. The defendant can never be called upon by any other party for satisfaction. In this respect the case is entirely different from *Burt v. Dewey* (*supra*), relied upon by the counsel for the defendant. In that case the owner, from whom the horse had been stolen, had a right to prosecute to judgment each one who had converted the horse, unless he had obtained satisfaction from one of them. Had Burt recovered judgment against Dewey his payment of the same, would have been no defence to Dewey in an action brought by the owner against him for his conversion of the horse, unless he could show that Burt had paid the judgment recovered by the owner against him. The judgment appealed from must be affirmed with costs.

Chief Judge and PECKHAM and ANDREWS, JJ., concur.  
ALLEN, FOLGER and RAPALLO, JJ., dissent.

Judgment affirmed.

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THE ATLANTIC DOCK COMPANY, Respondent, v. WILLIAM H.  
LIBBY et al., Appellants.

A factory and machinery for distilling paraffine oil is not a "distillery," within the meaning of a covenant against the erection or maintenance of a distillery. CHURCH, Ch. J.

Evidence of an insurance agent, as to the reasons why the insurance company with which he was connected had refused to insure certain property, is inadmissible to show the dangerous character of the business carried on upon the property, especially where such agent admits that he has himself no personal knowledge of such business.

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An action was commenced by a grantor to restrain the carrying on by the grantee of a certain business in violation of the covenants in the deed, and for \$1,000 damages. The value of the property affected by this action was \$50,000.—*Held*, that an extra allowance of costs under section 309 of the Code could not be computed upon the value of the premises.

(Argued April 21st; decided May 30th, 1871.)

APPEAL from the judgment of the General Term of the Supreme Court, in the second judicial district, affirming a judgment entered upon the report of a referee in favor of the plaintiff, and from the order granting the plaintiff an extra allowance of costs of \$500.

The defendants occupy several lots of ground as owners and lessors, in the city of Brooklyn, conveyed by the plaintiff to one Worcester, from whom title is derived. The deed to Worcester contains the following clause:

“And the party of the second part for himself, his heirs and assigns, doth hereby covenant with the said Atlantic Dock Co., and their successors, that neither the said party of the second part, or his heirs or assigns, shall or will at any time hereafter erect upon any part of said lots \* \* \* any manufactory of gunpowder, glue, varnish, vitriol, turpentine, or any brewery, distillery, slaughter-house, or other noxious or dangerous trade or business.” The grantee did not sign the deed, but accepted and recorded it. Upon the premises granted the defendants manufactured paraffine or lubricating oil, which is obtained from a residuum of petroleum (petroleum tar), by distillation, a process of evaporation and condensation, the crude material being vaporized at a high temperature and passed through a worm to a condenser. The plaintiffs claim that such use is in violation of the above restriction. The issues were referred to a referee. He held, that a “distillery” had been erected, and found as particularly stated in the opinion; and adjudged that the defendants be perpetually enjoined and restrained from carrying on the business carried on by them on said premises. The defendants excepted to the introduction of certain testimony of an insurance agent bearing upon

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the question of the "dangerous" character of the business, which is sufficiently referred to in the opinion of the court, and also to an extra allowance of costs.

*Joshua M. Van Cott*, for the appellants.

*Samuel Hand & N. Burchard*, for the respondent. On the question of the findings of fact, *Thompson v. Kessel* (30 N. Y., 383); *Loeschick v. Baldwin* (35 N. Y., 326); *Reformed Dutch Church v. Brown* (24 How., 74). On the question of the deed, which was not signed by the grantee, 2 Co. Lit. p. 187; *Torry v. Bank of Orleans* (9 Paige, 659); *Belmont v. Coman* (22 N. Y., 438); *Spaulding v. Hallenbeck* (35 N. Y., 207); *Burnett v. Lynch* (5 Barn. & Cress., 596). Upon the construction of the restrictive clause, *Parkhurst v. Alexander* (1 John., Ch., 510); *Dick v. Balch* (8 Pet., 30); *Tulk v. Moxhay* (11 Beav., ); *Tallmage v. E. R. Bank* (26 N. Y., 105); *Bishop v. Elliot* (11 Exch., 113); *Clark v. Martin* (1 Amer. Law Reg., 479); 29 Beav., 4. Even if not strictly a distillery, it comes within the prohibition, according to the maxim *noscitur a sociis*. (*Cullen v. Buller*, 5 Maule. & Sel., 465; *Aiken v. Wasson*, 24 N. Y., 484; Broome's Leg. Max., 450; *Atlantic Dock Co. v. Leavitt*, 50 Barb., 135.) The business was a nuisance at common-law. (*Catlin v. Valentine*, 9 Paige, 571; *Whitney v. Bartholomew*, 21 Conn., 213.) The covenant must be sustained, even if the plaintiff sustain no pecuniary loss from its breach. (*Barron v. Richards*, 8 Paige, 351; *Whitney v. Union R. R. Co.*, 23 Bost. L. R., 303; *Hoyt v. Carter*, 19 Barb., 212; *Kemp v. Joher*, 1 Sim. R., 517; *Burt v. Haslet*, 18 Com. Bench., 162.) On the question of the extra allowance, *People v. A. & V. R. R. Co.* (16 Abb., 465); *Coleman v. Chauncey* (7 Rob., 579).

CHURCH, Ch. J. The covenant was not to erect or permit upon the premises in question "any manufactory of gunpow-

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der, glue, varnish, vitriol, turpentine, or any brewery, distillery, slaughter-house, or other noxious or dangerous trade or business."

I am inclined to think that the building in which the defendants carry on the business of manufacturing paraffine oil is not a distillery, within the strict meaning of that word, as used in the covenant. Words are to be given the signification which the parties intended, and we are to presume that signification was intended which is generally understood and in general use. The definition of a distillery within this rule is a place or building where alcoholic liquors are distilled or manufactured, and not every building where the process of distillation is used. That process might be employed in a building or business not within the intended restrictions of the covenant, and not within the objects intended to be secured by the prohibition. But it is not very important whether the manufactory is technically a distillery or not, within the meaning of the covenant. If the business is dangerous or noxious, it is equally within the prohibition of the covenant as if it came within the accepted definition of a distillery. The general words *noxious* and *dangerous* are to be construed in the light of the previous specifications upon the maxim *noscitur a sociis*. (*Aiken v. Wasson*, 24 N. Y., 484.) Business or trade of the character of those specifically described were intended to be protected.

The referee has found that the defendants have erected a distillery for the manufacture of paraffine oil, and carry on that business; that the business is so carried on as to cause an offensive and unwholesome odor to arise from said premises; that a smoke is produced, by which a soot is scattered about the adjoining premises, blackening whatever articles it falls upon; that furnaces are kept at an unusual and extreme heat; and that occasionally a "lurid flame" arises, which, with the fires, give to all persons in the vicinity reasonable apprehension of danger from fire both to persons and property.



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We cannot review the facts except for the purpose of determining whether there is any proof to sustain the findings of the referee. There is evidence to warrant the finding that the business carried on is noxious. In addition to the want of proper drainage and the stagnant pools of water allowed to remain on the premises, and the smoke and soot, which is sometimes offensive, there is evidence tending to show that the treatment of the oil for the purpose of purification, after it has passed through the process of distillation, by mixing with it sulphuric acid, creates a pungent, offensive and unwholesome odor, which seriously affects those residing in the immediate vicinity. It is claimed that this odor is not unhealthy, and there is conflicting evidence upon the point, but all the witnesses agree that it is very disagreeable, and several aver that it is extremely offensive and nauseous.

It is claimed by the learned counsel for the appellant, that the referee has not found facts sufficient to warrant the conclusion of the law that this manufactory or business is "dangerous," within the meaning of the covenant. The finding of fact that the furnaces and stills are kept at an *unusual and extreme heat*, which, with the "lurid flame," give to all persons in the neighborhood *reasonable apprehension of danger*, is fully supported by the evidence, and, although not as direct as might be desirable, is sufficient to authorize the conclusion that the business is dangerous, within the meaning of the covenant, and quite as much so as an ordinary distillery, which the parties evidently regarded as dangerous within the principle referred to. But the direct finding that the business is dangerous, is a finding of fact, although contained in the conclusions of law. (2 Keyes, 228.)

The referee committed an error in allowing the witness, Harris, to state the reason why the insurance company with which he was connected would not insure this building, after he had stated that he knew nothing of the building or the business, or the process of manufacturing the oil. Such evidence was the mere opinion of one who had no knowledge upon the subject, and was inadmissible, although it related

only to one branch of the case, that of the dangerous character of the business.

The object of the plaintiff in exacting the covenant is manifest. They were the owners of a tract of land of which these lots are a part, and their design was to protect themselves from loss by the depreciation of their other property, by reason of proximity to the prohibited establishments, which are regarded as objectionable, and to enhance their value by exempting them from contact with such establishments. The covenant was lawful; the parties had a right to make it, and we have no power to change or alter it. It is difficult to read this covenant and the evidence in this case, without being impressed with the conviction that the business of the defendants, as carried on by them, is within the fair meaning and intent of the restrictive words as contemplated by the parties. (*Barrow v. Richards*, 8 Paige, 351.) The defendants took the premises *cum onere*, and if loss results to them by reason of the nature of their business, it is legally attributable to the violation of their assumed obligation.

For the error in receiving incompetent evidence, we see no way properly to dispose of the case, with due regard to the interests of both parties, except to grant a new trial.

Judgment reversed and new trial ordered, costs to abide the event.

The order allowing the plaintiff \$500, as an extra allowance of costs, must be reversed. The referee certified that the value of the real estate of the defendants, with their factory machinery, affected by this action, is upward of \$50,000.

The 309th section of the Code authorizes an allowance "not exceeding five per cent upon the amount of the recovery or claim, or subject-matter involved." The action was brought to restrain the carrying on of certain business, and for one thousand dollars damages. No damages were recovered, but the action was sustained for the injunction. The question, therefore, is, whether the *subject-matter involved* in the action was the value of the premises and machinery. I think not. There is nothing to show that they are not as

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valuable for other purposes as for the business which has been carried on, and the title of the defendants is not affected or impaired by the judgment.

All concurring except PECKHAM, J., who was for affirmance, and FOLGER, J., for affirmance with modifications. Judgment reversed and new trial granted.

COURTLANDT KELSEY, Appellant, v. THE NORTHERN LIGHT OIL COMPANY OF NEW YORK, Respondents.

The defendant, a stock company, was formed, and A., one of its projectors, subscribed for certain shares of its stock. He employed L. to dispose of stock in the company. The plaintiff, a purchaser from L., sought to rescind his contract of purchase, and to recover from the company the money already paid by him, on the ground of L.'s fraudulent misrepresentations. On the trial, evidence was offered tending to show that the projectors of the company had agreed to subscribe for its whole stock; that A. had no authority to act as its agent, and that any stock ordered by him to be sold was only such as he had subscribed for. This evidence was controverted.—*Held*, that it was error for the court to take from the jury the question of ownership, and whether L., was merely the agent of A., or was also agent of the company.—*Held*, further, that if the plaintiff had purchased stock owned by A., he could not maintain an action against the company for the recovery of money paid for the stock.

The company, in its prospectus, set forth a description of ten tracts of land, or interests in land, which it proposed to purchase. It purchased eight of those specified, but was unable to secure the other two on account of defect in the title.—*Held*, that in an action brought for fraud in the representations of the prospectus, it was error for the court to charge, if upon the prospectus the plaintiff had a right to believe that it was reasonably certain that the company would acquire the property, and that the company was organized with a view to the ownership of those pieces of property, then, if it did not obtain them, the plaintiff would be entitled to recover.

(Argued April 26th: decided May 23d, 1871.)

APPEAL from the order of the General Term of the Supreme Court, in the first judicial district, reversing the judgment rendered upon the verdict of a jury in favor of plaintiff.

This action was brought to recover back from the North-

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ern Light Oil Company the sum of \$1,000, which the plaintiff alleged he had paid to the company on a subscription by him, for one hundred shares of its capital stock, on the ground that such subscription had been procured by false and fraudulent representations made by the company, and that the plaintiff had, upon the discovery by him of the fraud, rescinded the contract, tendered back to the company the stock he had received, and demanded a return of the money he had paid, which demand was not complied with.

The complaint alleged that the company, "for the purpose of effecting sales of its capital stock, and inducing the plaintiff and others to subscribe therefor, caused certain prospectuses to be issued and distributed by its officers and agents, and also certain advertisements to be published in the public newspapers of the city of New York, and elsewhere, stating" (to give the substance of the representations alleged to have been false), that the company had, among other pieces of property, an interest in the "Smith Jones" farm on Oil creek, Venango county, Pennsylvania, namely: Four-ninths of all the oil on three acres of said farm; and an interest in the "Widow McClintock" farm, namely: One-fourth of all the oil in the "Hammond" well, which was one of the largest flowing wells on the creek, and averaged more than 200 barrels of oil a day; that the company's property consisted of about 270 acres in fee and lease-hold interest, and about 200 acres in fee simple, on which were thirty-eight wells, either then being drilled, or pumping, or flowing; and that from the wells then in operation the product to the company was over 125 barrels of oil per day.

The falsity of the representations was alleged to consist in this: That the company did not own any interest whatever, either in the "Smith Jones" farm, or in the "Hammond" well, on the "Widow McClintock" farm; that there were not thirty-eight wells in progress or in operation on the property of the company; and the product of oil from the property of the company was much less than 125 barrels per day; and that the falsity of the representations in these respects was known to the officers of the company.

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The answer denied the making of any of the representations alleged, and set forth that the plaintiff did not acquire his stock from the company, but from certain other parties. It admitted that the company did not own any interest in the "Smith Jones" farm, or the "Hammond" well, the titles to those pieces of property having been rejected as invalid.

The plaintiff proved by one Philip A. Lockwood that he (Lockwood) sold to the plaintiff 100 shares of the stock of the company, and that he acted in making such sale under the employment and as the agent of a firm called Avis, Plummer & Co. He obtained this employment by writing a letter to a firm styled John Boyce & Son, who were named in an advertisement in a newspaper as subscription agents of the company. It appears that there was a connection between John Boyce & Son and Avis, Plummer & Co., and that the letter thus written by Lockwood came to the hands of Avis, of the latter firm, who called upon Lockwood and employed him. Avis gave to Lockwood several papers relating to the enterprise of forming the Northern Light Oil Company. These were: 1. A paper entitled "mining affairs." 2. A paper entitled "Northern Light Oil Company of New York and Pennsylvania." 3. A paper entitled "prospectus of the Northern Light Oil Company of New York," with a subscription paper attached thereto, which the plaintiff signed.

These papers were exhibited by Lockwood to the plaintiff and the latter signed the subscription paper and paid Lockwood \$300, which the latter remitted to Avis, Plummer & Co., and received from them a receipt therefor, signed by Silvanus J. Macy, "trustee." He subsequently received from the plaintiff other sums on account of this stock, which he remitted to Avis, Plummer & Co., or to Macy, directly, and received therefor like receipts, signed by Macy in like manner, and after the requisite number of payments were thus made, he received from Macy a certificate that the plain-

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tiff was entitled to 100 shares of the stock of the company, and delivered it to the plaintiff.

The contents of these papers, so far as they bear upon the points decided, are sufficiently stated in the opinion of the court.

At the conclusion of the trial the defendant's counsel asked the court to charge five propositions, of which the judge charged the fifth as requested and refused to charge the others. Of these, the first, second and fourth were that there was not sufficient evidence to establish certain facts. The third is exactly stated at the beginning of the opinion of the court, and was to the effect, that the plaintiff could not recover if Avis was acting for himself and not the company in employing Lockwood.

The defendants excepted to the charge "that the company did receive the avails of that money;" that is, of the money paid by the plaintiff to Lockwood.

The defendants further excepted to so much of the charge "as leaves it to the jury to determine whether the prospectus was a declaration of intention or design to acquire certain property," and in particular to that part of the charge which is in the following words: "You will determine, therefore, in the first place, whether the prospectus was simply a declaration of intention or design to accomplish these results if they could. If upon this paper the plaintiff had the right to believe that it was reasonably certain that the company would acquire the property, and that the company was organized with a view to ownership of these pieces of property, then if they did not obtain it, he would be entitled to recover." The jury found a verdict for the plaintiff.

*William Henry Arnoux*, for the appellant.

*James C. Carter*, for the respondent. A representation, the falsity of which will avoid a contract, or afford a ground of action for damages, must purport to be an existing fact. (*P. & J. P. Plankroad Co. v. Griffin*, 21 Barb., 454, 466; see, also, *Kennedy v. The Panama, etc., Mail Co.*, 2 Law

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Rep., Q. B., 580.) The construction of all writings, when no parol evidence is received, belongs exclusively to the court. (1 Greenleaf on Ev., § 277, note.) The contract sought to be rescinded, was not made between the plaintiff and the company. (*H. & D. Plankroad Co. v. Rice*, 7 Barb., 157; *T. & B. R. R. Co. v. Tibbets*, 18 Barb., 297; *P. & J. P. Plankroad Co. v. Griffin*, 21 Barb., 454; *R. & W. Plankroad Co. v. Barton*, 16 N. Y., 457.)

GROVER, J. The court erred in refusing to charge the jury as requested by defendant's counsel, that the plaintiff could not recover, if the jury believed that Mr. Avis, in employing Mr. Lockwood to dispose of stock in the company, or to procure subscriptions therefor, was acting, not as the agent of the company, but for the purpose of disposing of stock in the company which he, Mr. Avis, had agreed to take, at or about the time of the formation of the company. Upon this question the testimony was conflicting. There was no question but that Lockwood, who procured the subscription of the plaintiff for stock, was employed for this purpose by Avis, and derived all his authority for this purpose from him. On the part of the plaintiff, evidence was given tending to show that Avis was employed by the company to procure subscriptions to and effect sales of stock belonging to the company, for its benefit, as its agent. On the part of the defendant, evidence was given tending to prove that the projectors of the company had severally agreed to take portions of the stock, in the aggregate amounting to the entire stock of the company; that Avis was one of these projectors, and that he agreed to take five thousand shares at ten dollars each; that he was never in any way employed by the company, as its agent or otherwise, to procure subscriptions to or otherwise to dispose of its stock; that he employed Lockwood, on his own account, to dispose of stock which he had agreed to take for himself or for his firm. There was no such preponderance in the testimony as to authorize the judge to take the question from the jury, or to direct a verdict for the plaintiff.

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The question should, therefore, have been submitted to the jury. It is obvious that the plaintiff could not maintain an action against the company for the recovery of the money paid for the stock, if Avis was his vendor, upon the ground claimed, viz., that he had rescinded the contract on the ground of misrepresentation of the property owned by the company. This error would require an affirmance of the order appealed from, but as the case presents another question which may affect the rights and liabilities of the defendant, it is proper that the court should consider and pass upon that also. The defendant's counsel excepted to the following portion of the charge: "You will determine, therefore, in the first place, gentlemen, whether the prospectus was simply a declaration of intention or design to accomplish these results if they could. If upon this paper the plaintiff had the right to believe that it was reasonably certain that the company would acquire the property, and that the company was organized with a view to the ownership of these pieces of property, then, if they did not obtain it, he would be entitled to recover." The verdict for the plaintiff may have been rendered solely upon this portion of the charge. To determine its correctness, we must not only examine the prospectus itself, but also the extrinsic facts in reference to which it was prepared, and, so far as these facts were known to the parties, in the light of which it must be construed, together with the extent of the failure of the company to obtain title to all the property specified in the prospectus. It may be remarked that there was no conflict in the testimony as to any fact bearing upon the construction, except as to whether the defendant was incorporated before or after the plaintiff subscribed for the stock. The paper in question was headed: "Prospectus of the Northern Light Oil Company of New York; Lands of the Company all on Oil creek, Venango county, Pennsylvania," and proceeds as follows: "George A. Boyce, Avis, Plummer & Co., of New York, and associates, propose to organize a company under the general mining laws of the State of New York, with a capital



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of \$1,000,000, consisting of 100,000 shares of the par value of ten dollars, to purchase and work the following petroleum oil lands and interests." Then follows a specific location and description of ten different pieces of property, each containing either a quantity of land or an interest in some existing oil well, or both. Then follows a recapitulation, in which the statement is as follows: The company's property now comprises about 270 acres in fee and lease-hold interests, and about 200 acres in fee simple, adding a statement of the number of wells thereon in process of drilling, and those completed and either pumping or flowing wells, with the quantity of oil obtained therefrom, and the price of the oil and the dividends that could be paid upon the stock of the company, and then proceeds as follows: Whereas, George A. Boyce & Avis, Plummer & Co., of 63 Pearl street, New York city, and their associates, propose to organize a company under the general mining and manufacturing laws of the State of New York, to be known as the Northern Light Oil Company, with a capital of \$1,000,000, consisting of 100,000 shares at the par value of ten dollars per share, whereas, said company intended to purchase certain oil and mineral lands situated in the township of Alleghany and Cornplanter, county of Venango, and State of Pennsylvania, and issue in payment therefor, 100,000 shares of the capital stock of said company; now, therefore, we, the undersigned, hereby subscribe, each for himself, the amount or number of shares set opposite our respective names, toward purchasing the annexed schedules of property at \$1,000,000. And it is hereby agreed and understood, that all moneys so subscribed shall be paid to a party or trustees, elected by the subscribers, after the whole amount of stock shall have been taken. Then follows a statement specifying the installments for payment of the stock subscribed for, and the times when payable.

This was the prospectus signed by the plaintiff in reference to which the charge excepted to was made. The statement in the recapitulation of what the property of the company consisted, must be construed in reference to the preceding and

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succeeding clauses of the paper so construed. No one could understand that the company, if then incorporated, actually had the title to any of the real estate specified in the prospectus. The object of the subscription as stated, was to enable the company to purchase the property specified for \$1,000,000. There was no assurance that the company had already acquired title, but only of an intention to purchase and operate it for oil purposes. There was no question made as to the entire good faith of the defendant. The company was incorporated and proceeded to acquire title to the property, and did obtain title to eight parcels of the property. It failed to obtain title to two of the parcels, for the reason that they were so situated that a satisfactory title thereto could not be obtained. The company purchased other land which it believed of equal value for oil purposes in the place of one of the parcels it failed to procure. It retained in its treasury \$75,000 in cash, which was the price of the remaining parcel, title to which could not be obtained. To hold, that after all this had been done by the company in good faith, the plaintiff had the right to rescind his contract for taking stock in the company, and recover from it the money paid therefor, in case a jury should find he had the right to believe that it was reasonably certain that the company would acquire each and every parcel of the property, and that the company was organized with a view to ownership of these pieces of property, would operate as a great hardship upon the other stockholders. The money of all has been, by the company, invested in real estate, pursuant to the intention upon which the company was organized. Doubtless all believed that the company would be able to purchase all the property specified in the prospectus, but each must have known that this was more or less contingent, depending upon the willingness of the then owners to sell and their ability to give a good title. As to two of the parcels, the case shows that a good title could not be obtained by the company. This risk each stockholder assumed for himself to the extent of his interest in the com-

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pany. The corporation, when organized, became the owner of all money that had been paid for its stock, and it had the right in good faith to proceed in the execution of the objects for which it was created. This it did by appropriating, so far as it appears, in good faith, its funds to the purchase of the property which it was designed it should acquire, so far as such lands could be purchased and a satisfactory title obtained. The unforeseen obstacle which prevented the purchase of two of the intended parcels was a misfortune which should be shared by all the stockholders, and if a loss was thereby sustained, such loss should be shared by all in common. The effect of the charge was to relieve the plaintiff entirely at the expense of some or of all the others. The error of this portion of the charge was not obviated by the further instruction that they must further find that it was material to the plaintiff that the company should own every parcel. If this was material to the plaintiff, it was equally so to the other stockholders. Had the plaintiff commenced an action for a distribution of the assets of the company before any purchase had been made, upon the ground that it had become impossible to carry its objects into effect, the case would have been different. Then equal justice could have been done to all. Now, none can be relieved, except at the expense of others equally innocent of intentional wrong as the plaintiff. *Gerhard v. Bates* (75 Eng. Com. Law, 475); *Biddle v. Levy* (2 id., 202); *Greenman v. Low* (4 Bos., 337), cited by the learned judge below in his dissenting opinion, were all cases of fraud, and have no application to the facts of this case. I have not referred to the other papers shown to the plaintiff to induce him to subscribe, for the reason that they have no bearing upon the question presented by the exception to the charge. The order of the General Term reversing the judgment for plaintiff and directing a new trial, must be affirmed, and judgment final given for the defendant, with costs upon the stipulation.

All concurring except PECKHAM, J., not voting. Judgment reversed.

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139 419THOMAS H. MAGHEE, Appellant, v. THE CAMDEN AND AMBOY  
RAILROAD TRANSPORTATION COMPANY, Respondent.

A contract made by a railroad corporation to transport and deliver goods at a point beyond the terminus of its own line contained the following clause: "Unavoidable accidents of the railroad and of fire in the depot excepted."—*Held*, that in the absence of proof of any other or new contract, this exception would be held to extend to every other connecting carrier, who shared the freight specified in the bill of lading, and that in an action against such connecting carrier, the goods having been lost while in its possession, he could claim the benefit of it.

The place where a carrier is accustomed to receive, deposit and keep ready for transportation or delivery, merchandise is a depot, within the general signification of the word.

When a carrier accepts goods to be carried, with a direction on the part of the owner to carry them in a particular way, or by a particular route, he is bound to obey such directions; and if he attempts to perform his contract in a manner different from his undertaking, he becomes an insurer, and cannot avail himself of any exception in the contract.

But if it should be shown in such a case that the loss must certainly have occurred from the same cause, if there had been no default or deviation, the carrier should be excused. The burden of proof of this fact, however, is on the carrier. ANDREWS, J.

Where the contract of a carrier is that the goods should be carried "all rail,"—*Held*, that the *necessary* crossing of ferries, in the transportation was not a deviation, and that the contract to carry "all rail" would be performed by the transportation by rail as far as was practicable. If, however, the goods could have been carried by rail, their transportation by any other mode, even for a few miles, would render the carrier liable as an insurer.

(Argued April 26th; decided May 30th, 1871.)

APPEAL from the judgment of the General Term of the Supreme Court, in the first judicial district, affirming the judgment of the Special Term in favor of defendants.

On the 21st of June, 1864, at Louisville, Ky., one Hunter, the plaintiff's agent, delivered to the Jeffersonville Railroad Company, for transportation to New York, certain merchandise, the property of the plaintiff. The company signed a bill of lading, which was sent to the plaintiff, together with

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an invoice of the merchandise. The bill of lading, after acknowledging the receipt of the merchandise by the Jeffersonville Railroad Company from Hunter, on account and risk of whom it might concern, contain an engagement "to deliver in like good condition and order at New York, unavoidable accidents of the railroad and *fire in depot excepted*, to Thomas H. Maghee or assigns, he or they paying freight at rates therein specified, all rail, P. R. R." The merchandise was transported over the route of the Jeffersonville Railroad Company to its terminus at Indianapolis, and thence by other companies, including defendants, to New York, upon an engagement between the several companies that they should share the freight specified in the bill of lading, and that the defendants should collect it for the common benefit. Defendants, a New Jersey corporation, engaged in the business of transporting passengers and freight between Philadelphia and New York, received the merchandise, then in due course of transportation, at Philadelphia, July 9th, 1864, and transported it over their railroad from Philadelphia to Amboy, and thence twenty miles by steamboat, which was a part of their regular line, to their depot on pier No. 1, North river, in the city of New York. The goods could have been transported from Philadelphia to New York by rail all the way. On the night of Sunday, July 10th, 1864, the depot, with its contents, including this merchandise, was destroyed by fire. Such destruction was not occasioned by design or neglect of either party. This action, brought by the plaintiff to recover their value, was tried, without a jury, by J. F. BARNARD, J. The court found, as matter of fact, that the destruction of the property occurred by fire in the depot, and was within the exception contained in the bill of lading, and, as a conclusion of law, that defendant was entitled to judgment.

*Charles Jones*, for the appellant. Where goods are delivered to a carrier, to be carried beyond the end of his own line, he may make a contract with other carriers. That con-

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tract binds the shipper and inures to his benefit. (6 How. U. S., 380.) The shipper can sue the sub-contractor. (2 Greenleaf's Ev., § 210; *Sanderson v. Lambertin*, 6 Binn., 129.) The second carrier is not the servant of the first. (6 How. U. S., 380; 2 Kern., 243; 1 Hilt., 235.) If the defendants are liable as common carriers, they are liable for the loss. (*Merritt v. Earle*, 29 N. Y., 115.) Construction of the contract, "all rail." (*Cassilly v. Young*, 4 B. Mon., 265; *Hand v. Baynes*, 4 Whart., 204.) The goods should have been stored, and not left in a shed. (*Merwin v. Butler*, 17 Conn., 138; *Ostrander v. Brown*, 15 Johns., 39; *Fisk v. Newton*, 1 Denio, 45.)

*Charles F. Sandford*, for the respondent. On the question of the carriers' right by special contract to secure exemption from liability. (*Harris v. Pockwood*, 3 Taunt., 264; *Beckwood v. House*, 5 Rawle (Penn.), 179; *N. J. S. Nav. Co. v. Merchants' Bank*, 6 How. U. S., 382; *Stoddard v. Long Island R. R. Co.*, 5 Sand., 180; *Parsons v. Monteath*, 13 Barb., 524; *Dorr v. N. J. S. Nav. Co.*, 1 Kern., 485; *Wells v. Steam Nav. Co.*, 4 Seld., 375; *Mercantile Mut. Ins. Co. v. Cables*, 20 N. Y., 173; *Welles v. N. Y. Cent. R. R. Co.*, 26 Barb., 641; *Smith v. Same Defendants*, 29 Barb., 132; *Wells v. Same Defendants*, 24 N. Y., 181; *Bissell v. Same Defendants*, 25 N. Y., 442; *P. and O. Steam Nav. Co. v. Shand*, 11 Jurist, 771.) On the question of the liability of the contracting company. (*McGregor v. Kilgore*, 6 Ohio, 358; *Fitch v. Newberry*, 1 Douglass [Mich.], 1; *Muschamp v. Lancaster R. R. Co.*, 8 M. & W., 421; *Mucha v. L. and S. W. R. R. Co.*, 2 Exch., 415; *Weed v. Saratoga and S. R. R. Co.*, 19 Wend., 534; *Mallory v. Burrett*, 1 E. D. Smith, 234; *Fairchild v. Slocum*, 19 Wend., 329; *Crouch v. L. and N. W. R. R. Co.*, 14 C. B., 259; *Hart v. R. and S. R. R. Co.*, 4 Seld., 37; *Green v. Clark*, 2 Kern., 343; *Wilcox v. Parmelee*, 3 Sandf., 610; *Quimby v. Vanderbilt*, 17 N. Y., 306; *Schröder v. Hudson R. R. Co.*, 5 Duer, 55.) On the

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question of the respective liability of the companies. (*Gesthorn v. S. S. R. R. Co.*, 8 Exch., 341; *Fitch v. Newberry*, 1 Douglass [Mich.], 1; *Muschamp v. Lancaster R. R. Co.*, 8 M. & W., 421; *Watson v. Ambergate R. R. Co.*, 15 Jur., 448; *Crouch v. L. and N. W. R. R. Co.*, 78 E. C. S., 254; *Hart v. R. and S. R. R. Co.*, 4 Seld., 37.) The shipper, who secures to himself a through rate of freight, reduced in proportion as his risk is increased and that of the carrier is diminished, should be deemed to have estopped himself from asserting against any carrier a liability voluntarily assumed by himself, when he stipulated for the rate of freight by which the carrier's compensation is measured and determined. (*Collins v. B. and G. R. R. Co.*, 25 L. J. R. [Exch.], 188; S. C., 29 L. J. R. [Exch.], 41; *Coxon v. The G. W. R. R. Co.*, 5 H. & N., 274; *Fitch v. Newberry*, 1 Doug. [Mich.], 1; *N. J. Steam Nav. Co. v. Merchants' Bank*, 6 How. U. S., 366; *Allen v. Smith*, 8 Cow., 301; *Munuf. Oil Co. v. C. and A. R. R. Co.*, 52 Barb., 72; *Mallory v. Burrett*, 1 E. D. Smith, 234.)

ANDREWS J. It will be convenient to consider in the first place, the nature and extent of the obligation of the Jeffersonville Railroad Company, under the contract of June 21, 1864, for the transportation of the property in question.

The road of that corporation commenced at Jeffersonville, on the Ohio river, in the State of Indiana, opposite Louisville, Kentucky, and terminated at Indianapolis, in the former State.

The goods were delivered to the corporation at Louisville, by the agent for the plaintiff, and on their receipt, a bill of lading was signed, whereby the Jeffersonville Railroad Company expressly agreed to deliver them to the plaintiff, in the city of New York, upon the payment by the plaintiff, or his assigns of a specified freight.

The undertaking of the corporation to deliver the goods was not absolute, but was qualified by the exception stated in the bill of lading, of "unavoidable accident of the railroad and

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fire in the depot," and after the specification of the freight to be paid, were the words and letters "all rail P. R. R."

The execution of the bill of lading by the Jeffersonville Railroad Company, and its acceptance by the plaintiff, concurrently with the delivery and receipt of the property, constituted a special contract between the parties for the carriage of the goods.

That corporation undertook, thereby, the carriage for the whole distance between Louisville and the city of New York, and it could not perform its contract to carry, except by the use of the roads of other corporations connecting with it, and forming a consecutive route to the city of New York.

That a railroad corporation may bind itself, by a contract to carry goods to a point beyond the terminus of its own line of road, is affirmed by the general current of authority, in England and in this country. (*Muschamp v. Lancaster R. R. Co.*, 8 M. & W., 421; *Mucha v. London and S. W. Railway Co.*, 2 Exch., 415; *Perkins v. Portland*, 47 Me., 573; *Meyer v. Rutland, etc., R. R.*, 27 Vt., 110; *Redfield on Railways*, 284 and cases cited.)

And in this State the doctrine, if not established, has been recognized in several cases. (*Ward v. Saratoga and Schenectady R. R. Co.*, 19 Wend., 534; *Hart v. Rensselaer and Saratoga R. R. Co.*, 4 Seld., 37 *Burtis v. the Buffalo and State Line R. R. Co.*, 22 N. Y., 269; *Schræder v. Hudson R. R. Co.*, 5 Duer, 55.)

There is a conflict between the English and American cases, as to the evidence by which a contract of a railroad corporation, to carry beyond the terminus of its own route, may be established; but this difference is immaterial in this case, as the contract of the Jeffersonville Railroad Company was express and unambiguous.

If the power of a railroad corporation, not specially authorized by its charter to make such a contract, is doubtful, such authority must be presumed in this case. The charter of the Jeffersonville Railroad Company is not in evidence;



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and it is to be assumed, in the absence of proof, that the contract was not *ultra vires*, or made in violation of law.

The plaintiff, then, by the contract, employed that corporation as carrier for the whole distance; and it was liable to the plaintiff for any default in performing it, whether such default occurred on its own road, or the road of any other corporation in the course of the transit.

If, however, the action had been brought against the first carrier to recover the value of the goods, the plaintiff could not have recovered, if the defendant in such suit could have shown that they were lost by a peril, within the exception in the bill of lading, and without negligence on the part of itself or its agents. (*Clark v. Barnwell et al.*, 12 How. U. S., 272.)

It is claimed by the plaintiff, that the language "unavoidable accidents of the railroad, and of fire in the depot," refers to loss from the excepted causes, while the goods were on the road or in the depot of the Jeffersonville Railroad Company, and creates no exemption from liability for such loss occurring elsewhere.

If this is the true construction, the plaintiff was entitled to recover, although the liability of the defendant was measured by that of the first carrier. The defendant at the time of the loss by fire, held the goods as carrier, and they were not destroyed by unavoidable casualty.

But we are of opinion, that the exception applies to a loss by accident or fire upon any road or in any depot while the contract of carriage is in force.

The exception is in the same clause with and immediately follows the engagement of the Jeffersonville Railroad Company to deliver the goods in the city of New York.

It is reasonable to suppose that the compensation fixed for the carriage, had relation to the restricted liability assumed by the bill of lading. The Jeffersonville Railroad Company, by undertaking to carry the goods to the ultimate destination, had an interest to make the exception commensurate

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with the scope and duration of its contract, and construing the contract with reference to the circumstances and subject-matter, the limit and construction of the language of the exception, claimed by the plaintiff, is not justified.

The fire occurred while the goods were at the place where the defendant was accustomed to receive, deposit and keep ready for transportation or delivery the merchandise carried by it, to and from the city of New York, and this was a depot within the general signification of that word.

Leaving out of view, for the present, the words in the contract "all rail," it follows from what has been stated, that no recovery could have been had by the plaintiff against the Jeffersonville Railroad Company for the loss in question.

But the plaintiff insists that he stands in a more favorable position in respect to the defendant, and that the defendant having participated in the carriage of the goods, and the loss having occurred while they were in its possession as carrier, it must be deemed to have taken the goods subject to the common-law liability of carriers, and that it cannot claim the benefit of the exemption in the original contract.

It does not appear under what agreement the defendant received the goods, beyond the fact contained in the stipulation of the parties, and found by the court, that the goods were transported by the several connecting lines upon an understanding and agreement between them to share the freight specified in the bill of lading, and that the defendant should collect the whole freight for the common benefit.

In what proportion the division was to be made, or whether any company was to receive anything beyond the usual charge for the transportation over its road is not shown. It is not found that the several companies participating in the service were partners, and if the division was to be made as last suggested, the arrangement would not constitute a partnership between them. (*Welby v. West Cornwall Railway Co.*, 2 H. & N., 702; *Mytton v. The Midland Railroad Co.*, 4 H. & N., 614.)

It is to be inferred, however, from the fact found, and the

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circumstances, that the goods were carried by the several connecting companies under some arrangement having relation to the plaintiff's contract with the first carrier. They were to share the freight "specified in the bill of lading."

The bill of lading, or a duplicate, usually, if not uniformly, accompanies the goods.

It was the duty of the Jeffersonville Railroad Company, under its contract, to provide for the transportation of the goods from the terminus of its road, by other lines; and no intervention of the plaintiff having been shown, it must be held that the connecting roads were acting under the employment of that corporation.

If the defendant took and carried the goods by contract made with the Jeffersonville Railroad Company, without any restriction of its ordinary liability, then it would not be denied that the plaintiff could avail himself of that contract, and recover of the defendant, notwithstanding the express contract with the Jeffersonville Railroad Company as carriers for the entire route.

All such contracts made by the first carrier would inure to his benefit, and he could at his election adopt them. (*Merchants Bank v. New Jersey Steam Nav. Co.*, 6 How. U. S., 380; *Green v. Clarke*, 2 Ker., 343; *Sanderson v. Lamberson*, 6 Binn., 129; 2 Green. Ev., § 210.)

But the plaintiff did not show that the defendant undertook to carry the goods under a contract more favorable to him than that which he made with the Jeffersonville Railroad Company; and the evidence does not authorize the inference that such a contract was made.

The defendant is to be regarded as having acted under and in subordination to the contract made with the first carrier, and can claim the benefit of any exception to which the Jeffersonville Railroad Company would have been entitled, if the action had been brought against that corporation.

The words, "all rail," inserted in the bill of lading, constituted a direction by the owner and an agreement by the

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carrier that the transportation should be by rail, in distinction from any other mode of conveyance.

When a carrier accepts goods to be carried with a direction on the part of the owner, to carry them in a particular way, or by a specified route, he is bound to obey such direction; and if he attempts to perform his contract in a manner different from his undertaking, he becomes an insurer, and cannot avail himself of any exceptions in the contract. (*Danseth v. Wade*, 2 Scam., 285; *Hartung v. Pepper*, 11 Pick., 41.

*In Steel v. Flagg* (5 Barn. & Ald., 342), a parcel of cashier's notes were delivered to a carrier, to be carried by a mail coach, and were sent by a different coach and were lost; notice had been given to the carrier, of which the owner was cognizant that he would not be answerable for the value of any article to an amount exceeding five pounds, unless it was insured, and the evidence tended to show that the owner had concealed the nature and value of the package, and it was claimed that the concealment was a fraud upon the carrier, and avoided his contract.

But the court held the carrier liable, and BAILEY J. said: "If this defendant had sent the parcel by the mail, in pursuance of his contract, I should have been of opinion that under the circumstances of the case, he would not have been liable for the loss, but having sent it by a different mode of conveyance, I am of opinion that he is liable."

This case is distinguished from the previous case of *Bateson v. Donovan* (4 B. & A., 20), on the ground that in this case the carrier acted in direct contravention of his contract. (Jones on Bailments, 28.)

In *Coleman v. New York Central Railroad Company* (33 N. Y., 610), the defendant received goods at Little Falls, destined to New York, "via People's Line," Albany, and agreed to deliver them to that line at the latter place. The line would not take them, and they were shipped by the defendant on a barge, and the barge and the goods were lost. The defendant was held to be liable, and PORTER, J., said: "When forwarding agents send goods in a mode prohibited by the

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owner, they do it at their own risk, and incur the liability of an insurer."

The same rule applies in case of deviation of a ship on the voyage, and is stated by STORY as follows: "If the owner deviate from the voyage, he is responsible for all loss, even from unavertable casualty; for, under such circumstances, the loss is traced back through all the intermediate causes to the first departure from duty." (Story on Bailments, § 509.)

If it could be shown, in such a case, that the loss must certainly have occurred from the same cause, if there had been no default, misconduct or deviation, the carrier would be excused; but the burden of proof of this fact would be upon the carrier. (*Davis v. Garrett*, 6 Bing., 716; *Danesh v. Wade*, *supra*; Story on Bailments, *supra*; Abbott on Shipping, 362.)

The defendant in this case relied for its defence upon the contract made with the Jeffersonville Railroad Company, and must be held to affirm all its provisions.

The goods in question were, by the contract, to be sent to New York by the Pennsylvania railroad, as indicated by the letters "P. R. R." There could not have been a literal performance of the contract to send them by "all rail." It was necessary to carry them across the Ohio river at Louisville before they could be taken upon the cars of the Jeffersonville Railroad Company, and they could not reach New York without crossing the Hudson river at Jersey City.

But the contract is to have a reasonable construction, and the necessity of crossing ferries in the course of the transportation must have been known to the parties, and this water carriage from necessity must be deemed to have been authorized. The contract to carry by rail would have been substantially performed by the transportation by rail so far as was practicable.

The defendant was a carrier from Philadelphia to New York, by rail to South Amboy, and thence twenty miles to New York by water. It is found by the court that this dis-

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tance by water was a part of the regular line traversed by the defendant in the prosecution of its business.

It appears in the evidence that there are several routes of carriage between Philadelphia and New York, and we think the court can take judicial notice of the existence of established railroad routes generally known and used.

The carrying of the goods by water from South Amboy to New York was not a necessity. The defendant, it is true, by its line could not have sent them otherwise; but upon seeing the direction in the bill of lading, it could have declined the service, together with the advantage which it might derive from performing it.

Having undertaken to carry the goods in violation of the instructions in the contract, it lost the benefit of the exception from liability.

This violation of duty brought the goods within reach of the peril which destroyed them, and the defendant is liable for the loss. The judgment should be reversed and a new trial granted.

Chief Judge and FOLGER and RAPALLO, JJ., concur. GROVER, J., dissented. PECKHAM, J., did not sit. ALLEN, J., having been of counsel, did not sit.

Judgment reversed. New trial granted.

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NOAH ROOT, Respondent, v. THE GREAT WESTERN RAILROAD  
COMPANY, Appellant.

The last paragraph of section 9, act of 1847, with reference to the liability of connecting railroads (chap. 270), does not apply to intermediate railroads, but only to the road which first receives the goods. PECKHAM, J., *contra*.

Where a railroad company agrees to carry property beyond the terminus of its own road, and receives the goods under such an agreement, it is liable as a common carrier, for the default of the road running in connection with it, on the route to the place of delivery. The statute of

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1847 (chap. 270, § 9) is a mere legislative authorization of such agreements. RAPALLO, J.

But where the company merely receives goods marked for a place beyond the termination of its own route, in the absence of proof of an undertaking, express or implied, to carry the goods to their final destination, or of a partnership between the carriers, the company is bound only for the due delivery of the goods to the next carrier on the route. The statute of 1847, has no application in such a case. RAPALLO, ALLEN, and FOLGER, JJ. (CHURCH, Ch. J., and GROVER, J., *contra*).

(Argued April 28th; decided May 23d, 1871.)

APPEAL from the judgment of the General Term of the Supreme Court, of the late seventh judicial district, affirming the judgment of a referee in favor of the plaintiff. (Reported below in 2 Lans, 199.)

The defendant was a Canadian corporation and a common carrier between Suspension Bridge, in the State of New York, and Detroit, in the State of Michigan. Its route was from Suspension Bridge by rail to Windsor, Canada, and thence across the Detroit River by ferry to Detroit. It had arrangements with the Michigan Southern Railroad Company, whereby the latter received from the defendant, at Detroit, goods destined for places west of that point, and collected the freight for the entire transportation of the property at its final destination, and four times each month a settlement was had, and the Michigan Southern Railroad Company paid to the defendant its freight moneys for the transportation to Detroit. In this manner, the roads of the two companies connected at Detroit, but no community of interest or partnership between the two companies was shown.

On the 14th of April, 1866, the plaintiff delivered to the New York Central Railroad Company, at Victor Station, New York, a box of goods marked "Noah Root, Burr Oak, Branch county, Michigan," upon the express contract that that company should transport the box to its warehouse at Suspension Bridge, and should not be liable for any loss of,

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or injury to, such property, after it should be sent from said warehouse.

The New York Central Railroad Company carried the property safely to Suspension Bridge, and there delivered it to the defendant, who received it on the 18th of April, directed as before stated.

Burr Oak lies west of Detroit, on the line of the Michigan Southern railroad.

The box was received by the defendant without any express contract or limitation of liability, and in the ordinary course of its duty as a common carrier.

On the 26th of April, the defendant delivered the box to the Michigan Southern Railroad Company for carriage to Burr Oak, by delivering it at the warehouse of that company at Detroit, the customary place for the delivery of freight arriving at Detroit by the defendant's line and destined to places on the line of the Michigan Southern Railroad Company.

The referee found that the goods were duly delivered by the defendant, and without unnecessary delay, to the Michigan Southern Railroad Company, for carriage to Burr Oak, and that said company duly received the same at its warehouse. It was also found that the invoices were not delivered, or a receipt taken for the goods at the time, for the reason that the agent of the Michigan Southern Railroad Company could not attend to the delivery at that time, and the next morning was agreed upon for the delivery of the invoice and receipts.

On the night of the 26th of April, the warehouse of that company and the property in question, which was therein, were destroyed by fire without any fault on the part of either of the companies. Other facts and the findings of the referee are specifically stated in the opinion.

On these facts the referee decided that the plaintiff was entitled to recover, and the judgment on this decision was affirmed at the General Term.



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*E. C. Sprague*, for the appellant. Where there is no evidence to sustain the finding, it may be reviewed in this court. (*Mason v. Lord*, 40 N. Y., 477.) On the question of defendant's liability. (*Van Santvoord v. St. John*, 6 Hill, 157; *Hood v. N. Y. and N. H. R. R. Co.*, 22 Conn., 16, 502; *Nutting v. Conn. R. R. Co.*, 1 Gray, 502; *Pierce on Amer. R. R. Law*, 501, *et seq.*; *Wright v. Brighton*, 22 Barb., 561; *Stratton v. N. Y. and N. H. R. R. Co.*, 2 E. D. Smith, 184; *Wiebert v. E. R. Co.*, 2 Kern., 255; *McDonald v. West. R. R. Co.*, 34 N. Y. R., 497; *Goold v. Chapin*, 20 N. Y., 259; *Johnson v. N. Y. C. R. R. Co.*, 33 N. Y., 610; 1 Amer. Rep., 78; 57 Barb., 516; 28 Barb., 485; 34 N. Y., 497; 25 N. Y., 364; 3 Kern., 572.) On the question of agreement between the two companies. (99 Mass., 220; 11 Allen, 295; 33 Conn., 166.) The complaint alleged no cause of action under the act of 1847, and no recovery can be had. (*Hempstead v. N. Y. C. R. R. Co.*, 28 Barb., 485.)

*Quincy Van Voorhis*, for the respondent.

RAPALLO, J. The findings of the referee, as set forth in the case, differ somewhat from those in the report, and contain three statements of fact which are excepted to on the ground that there was no evidence to sustain them, viz.: 1st. That the defendant had an agreement with the Michigan Southern Railroad Company to carry freight along its line west. 2d. That the two companies had connecting roads at Detroit. And, 3d. That the defendant received the property in question at Suspension Bridge "to carry and transport to its destination of Burr Oak."

It has been heretofore held that a finding without any evidence to sustain it can be reviewed in this court. (*Mason v. Lord*, 40 N. Y., 477; *Putnam v. Hubbell*, 42 N. Y., 106.) There was no evidence tending to prove any such agreement between the defendant and the Michigan Southern Railroad Company for the transportation west of Detroit of goods brought to that place by the defendant, as would constitute

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the Michigan Southern Railroad Company, the agent of the defendant in such transportation, or create any partnership between the two companies; and if the finding is intended to convey the idea that the agreement of the Michigan Southern Railroad Company was to carry freight for or upon the responsibility of the defendant, it is wholly unsupported by the evidence, and cannot be regarded as properly in the case. But such is not the necessary construction of the finding. The evidence establishes merely that property arriving by defendant's railroad at Windsor and destined for places on the line of the Michigan Southern road was habitually brought across the river from Windsor to Detroit by boat, landed on the dock, and carried by trucks to the premises of the Michigan Southern Company, and there delivered to it with the invoices; that it was the practice of the defendant to charge to the Michigan Southern Company the freight on all goods so delivered to it and to take receipts for the goods; that the last named company collected the entire freight at the place of final destination, and settled with the defendant four times a month for the freight payable to it for the transportation to Detroit; that as soon as the goods were delivered to the Michigan Southern Company, it became liable to the defendants for the back freight, and if lost, the Michigan Southern Company had to bear the loss.

The finding, therefore, cannot be construed to go farther than to establish that there were arrangements between the two lines for the delivery to and receipt by the Michigan Southern Company of goods brought by defendant's line to Detroit, to be forwarded from thence to places on the line of the Michigan Southern railroad, and that in so receiving the goods, the latter company assumed the payment of the back freight thereon. In so delivering the goods, the defendant acted simply as a forwarder, and its liability is not increased by giving credit to the Michigan Southern Railroad Company for the back freight until settling day, instead of collecting the freight on each parcel at the time of delivery to the last named company.

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The next finding excepted to is that the companies had connecting roads at Detroit for the transportation of passengers and property for hire through Michigan.

This finding is sustained by evidence that a connection was made between the two roads by means of the ferry boat and wharf, as before stated. It does not establish that there was any joint business carried on by the two roads, but merely that a physical connection was formed by the means described in the evidence. The roads might run in connection and together cover an entire distance, each company being a carrier over its own road only. (12 N. Y., 248.)

The third finding excepted to is that the New York Central Company delivered the property in question to the defendant at Suspension Bridge, and the defendant then and there received the same "to carry and transport to its destination of Burr Oak," etc.

The only evidence contained in the case in support of this finding, is the admission of the parties on the trial that the goods in question were shipped at Victor, Ontario county, N. Y., and that the defendants received them from the agents of the New York Central railroad in charge of their warehouse at Suspension Bridge, in Niagara county, together with the proof that the box containing the goods was marked "Noah Root, Burr Oak, Branch county, Mich."

It is further found by the referee, that the goods were received by the defendant without any express contract or limitation of liability, and in the ordinary course of its business and duty as a common carrier, and there is no evidence of any express contract as to their transportation by the defendant. Unless, therefore, the receipt of goods thus marked, in the ordinary course of business of a carrier, raises by operation of law an implied contract to carry them beyond the line of the carrier receiving them, and to deliver them at the final destination designated by the marks, there is no foundation for the finding of any such contract.

The English authorities hold that in such a case the company first receiving goods marked for a particular place,

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Opinion of the Court, per RAPALLO, J.

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without expressly limiting its responsibility, undertakes *prima facie* to carry them to their destination, even though beyond the limits of the company's route, and is to be regarded as a carrier throughout the entire route; and that this rule applies when the goods are directed to points even beyond the limits of England; and the English cases have carried the rule so far as to hold the contract is exclusively with the first company, and that there is no right of action in favor of the owner against any of the subsequent companies on the route. (*Muschamp v. Lancaster and P. R. W.*, 8. M. & W., 421; *Watson v. Ambergate R. W.*, 3 Eng. L. & E., 497; *Scothorn v. S. Staffordshire R. W.*, 8 Exch., 341; *S. C.*, 18 Eng. L. & E., 553; *Wilson v. York R. W.*, 18 Eng. L. & E., 557; *Crouch v. London and N. W. R. W.*, 25 Eng. L. & E., 287; *Bristol and Ex. v. Collins*, 7 Ho. Lds. Cas., 194.)

But a different rule has been adopted in this and other States of the Union, and it is here held that the receipt of goods marked for a place beyond the terminus of the carrier's route does not import a contract to carry them to their final destination; but that, in the absence of a special contract, and of a partnership between the connecting lines, the carrier is only responsible to the extent of his own route, and for the safe delivery to the next connecting carrier; that in such a case the carrier is merely a forwarder from the terminus of his own line, and that where goods thus marked are delivered to a carrier, unaccompanied by any particular directions, except such as might be inferred from the marks themselves, the carrier is only bound, at the terminus of his own line, to deliver them according to the established usage of the business in which he is engaged. (*Van Santvoord v. St. John*, 6 Hill, 158, 161, 162; *Jameson v. C. & A. R. W. Dist. Ct. Phila.*, 4 Am. L. Reg., 234, note.)

The respondent relies, however, upon the provisions of section 9 of chapter 270 of the act of 1847, which reads as follows: "Any railroad company receiving freight for transportation, shall be entitled to the same rights, and be subject to the same liabilities as common carriers.

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Whenever two or more railroads are connected together, any company owning either of said roads, receiving freight to be transported to any place on the line of either of said roads so connected, shall be liable, as common carriers, for the delivery of such freight at such place. In case any such company shall become liable to pay any sum, by reason of the neglect or misconduct of any other company or companies, the company paying such sum may collect the same of the company or companies by whose neglect or misconduct it became so liable."

It is claimed, on the part of the respondent, that this act has changed the rule laid down in the case of *Van Santvoord v. St. John*, and, in effect, introduced the English doctrine, which implies an undertaking to carry through from the mere receipt of goods marked for a place beyond the route of the carrier.

On the other hand, it is claimed that the only effect of the act of 1847, is to give validity to contracts made by railroad companies for the transportation of freight to places beyond the terminus of their roads (the power to make such contracts having been questioned), and to define the character of the responsibility imposed by such contracts, and not to create a liability to carry through, when no contract to that effect was made.

The latter view of the statute received the sanction of this court in the case of *Burtis v. The Buffalo and State Line Railroad Company* (24 N. Y. R., 269.) In that case, there was an express contract to carry to the place of final destination, beyond the terminus of the route of the first carrier.

A majority of the court were of opinion that, independently of the statute, the company had the corporate power to make such a contract; but all the judges, save one, agreed that the statute removed all question on that point; and the majority concurred in the construction given to the statute in the prevailing opinion of DENIO, J., which is to the effect that it was not intended to impose the responsibility mentioned in the statute, upon any of the railroads against the

consent of the company owning them. That the language, "receiving freight to be transported to a place on the line of another road," limited the operation of the statute to cases of a company receiving property, and agreeing, expressly or by implication, to carry it to a place on another connecting road; and that the meaning of the act was that, if a railroad company agreed to carry property beyond the terminus of its own road, and received the goods under such an agreement, it should be liable as a common carrier for the delinquencies of the road running in connection with it, on the route to the place of delivery.

This seems to us to be the natural construction of the statute.

The section in question, appears, on its face, to be intended as declaratory, rather than as introducing any new rule of law or evidence. It begins by declaring that "any railroad company receiving freight for transportation, should be entitled to the same rights, and be subject to the same liabilities as common carriers." This is purely declaratory.

The section then proceeds to declare the character of liability incurred by a railroad receiving goods to be transported to places beyond its own lines. Although now it seems to be conceded that such an undertaking, on the part of a railroad corporation chartered to run between points, is not *ultra vires*, yet before the passage of the act, much doubt had existed on that point. And it is not unreasonable to assume that the object of this act was to remove that doubt and declare what liability should result from such a contract.

Such an undertaking may be established by express contract, or by showing that the company held itself out as a carrier for the entire distance, or received freight for the entire distance, or other circumstances indicating an understanding that it was to carry through, but at the time of the passage of the act of 1847, it had been settled by the case of *Van Santvoord v. St. John*, that the marks on the goods were not of themselves evidence of such an undertaking. This rule was understood by shippers and

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acted upon by carriers. If the statute had intended to change it, it should have contained some specific language, which would warn carriers to decline to receive goods thus marked, unless they intended to assume responsibility for their carriage to the place indicated by the mark, however distant.

It was by confining the operation of the statute to the effect of the undertaking, when voluntarily assumed, that this court arrived at the conclusion in the case of *Burtis v. Buff. and S. L. R. R.* (24 N. Y., 269), that a carrier receiving goods under such an agreement was chargeable with the defaults of connecting roads beyond the limits of the State. The apparent injustice of holding a company subject to the liability declared by the statute, in cases where the provisions of the same statute giving a remedy over against the defaulting road could not operate, was obviated by holding that the liability is not imposed by the statute, but must be voluntarily assumed by the carrier. The result of this construction is, that in the absence of proof of an undertaking, express or implied, to carry the goods to their final destination, the statute has no application, and therefore the defendant was bound only for the due delivery of the goods to the next carrier on the route.

But there is a further ground for holding the statutory provision inapplicable to the present case. We are satisfied from a careful consideration of the language of the act of 1847, and of the apparent purposes of the provision in question, that it was intended to apply only to the company, which, in the first instance, receives the goods from the shipper, and that it does not refer to the various intermediate carriers into whose custody the goods may afterward come from time to time in the course of their journey. The shipper in the present case having made a contract with the company to whom he delivered the goods, expressly restricting its liability to the terminus of its own line, we think that the statute cannot be resorted to for the purpose of determining the character of the liability of the subsequent carriers. These views of the statute lead to a reversal of the judgment, on the

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ground that the finding by the referee of a contract by the defendant to carry the property to Burr Oak is not sustained by evidence, and that the act of 1847 does not obviate that difficulty.

The judgment cannot be sustained on the ground that the evidence discloses unnecessary delay in delivering the goods to the Michigan Southern Company. The referee has expressly found that there was no such delay, and there was evidence in support of that finding. (See *Wiebert v. The N. Y. and Erie R. R. Co.*, 2 Kern., 245).

Nor did the failure of the defendant to deliver the invoice or way-bill with the goods and to take a receipt invalidate the delivery to the Michigan Southern Company. It is found that the goods were actually delivered to and duly received by that company at the usual place, and that the omission to deliver the way-bill and to take a receipt at the time, was not attributable to the default of the defendant, but to the temporary engagements of the agent of the Michigan Southern Company. The defendant was, by the delivery, divested of all control over the goods, and the Michigan Southern Company having taken them into its custody, became responsible for them as a common carrier, immediately upon their receipt and without the delivery of the way-bill, notwithstanding the usage between the companies to deliver it. The case of *Michaels v. The N. Y. Cen. R. R. Co.* (30 N. Y., 564), is a direct authority on this point.

The judgment should be reversed and a new trial ordered, with costs to abide the event.

CHURCH, Ch. J., ALLEN, GROVER, FOLGER and ANDREWS, JJ., concurred in result. PECKHAM, J., for affirmance.

Upon the question whether the act of 1847 renders the carrier liable for the transportation of the goods to the place for which they are marked, without further evidence of a contract, ALLEN and FOLGER, JJ., concur in the opinion; ANDREWS, J., does not vote; CHURCH, Ch. J., and GROVER J., dissent. CHURCH, Ch. J., ALLEN, GROVER and ANDREWS, JJ., concur that the act refers only to the carrier first receiving



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the goods, and not to intermediate carriers. PECKHAM, J., dissents.

Judgment reversed. New trial ordered.

THADDEUS KINNIER, Appellant, v. ABBY A. KINNIER,  
Respondent.

As regards the validity in this State of the decree of a court of competent jurisdiction in a sister State, the *status* of the parties within that State, and the question whether they or any of them were residents of that State, so as to give them a standing in court there, for the purposes of such decree, are to be determined by that court, and their determination thereupon cannot be questioned collaterally in our own.

The former husband of the defendant, a resident of Massachusetts, went to Illinois expressly to procure a divorce from her, commenced an action there in the proper court for that purpose, and she having appeared and permitted, by collusion with him, a decree of divorce to be granted against her, subsequently married the plaintiff here.—*Held*, in an action here, brought to annul the last marriage on the ground of the defendant's former marriage being still in force, that a complaint stating the above facts was insufficient, and a demurrer thereto must be sustained. (*Jackson v. Jackson*, 1 J. R., 424, questioned.)

Every judgment may be impeached for fraud or want of jurisdiction, and this rule applies as well to judgments of other States as to those rendered in our own. But there must be facts which show it to be against conscience to execute the judgment, and which the injured party could not make available in a court of law, or which he was prevented from presenting by fraud or accident, unmixed with any fraud or negligence in himself or his agents.

The *lex loci* which is to govern married persons, and by which the contract is to be annulled, is not the law of the place where the contract was made, but where it exists for the time, where the parties have their domicil, and where they are amenable for any violation of their duties in that relation.

An allegation in a pleading, that the judgment of another State is void by the laws of that State, is a statement of a conclusion of law and not a fact, and is not deemed admitted by a demurrer.

(Argued April 26th; decided May 23d, 1871.)

APPEAL from the judgment of the General Term of the Supreme Court, in the first judicial district, affirming the

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| 45  | 535    |
| 173 | 508    |

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order of the New York Special Term, sustaining a demurrer to the complaint.

The defendant was married in Massachusetts, in 1848, to one Pomeroy. In 1855, Pomeroy went thence to Chicago to procure a divorce for a cause which would not be recognized by the laws of Massachusetts, and to evade the laws of that State. The defendant went to Chicago; appeared in the action, and put in an answer. The plaintiff put in no replication, as the law of the State required him to do, and the answer stood confessed. The parties, however, by collusion, procured to be entered and docketed, a formal decree of divorce, by which the parties were declared absolutely divorced. This was in September, 1855. In June, 1861, the present plaintiff and defendant were married. This action was brought to annul the marriage on the ground that the former marriage of the defendant was in force, and her divorce from Pomeroy void in this State. The complaint alleged the above facts. It is also alleged that the divorce was by the laws of Illinois void. There were two grounds of demurrer to the complaint, 1st, that this court has no jurisdiction of the alleged cause of action. 2d. The complaint is insufficient.

*George W. Parsons*, for the appellant. On the question of the impeachment of a judgment for fraud. (Story's Con. of Laws, § 608; 2 Kent's Con., 107, 108; *Jackson v. Jackson*, 1 John., 424; *Borden v. Fitch*, 15 John., 121; *Starbuck v. Murray*, 5 Wend., 148; *Bradshaw v. Heath*, 13 Wend., 407; *Myers v. Butler*, 6 Barb., 613; *Dodd v. Kew*, 42 Barb., 317; *Dobson v. Pearce*, 12 N. Y., 156; *Lazier v. Westcott*, 26 N. Y., 153; *Smith v. Woodworth*, 44 Barb., 198; *Buttrick v. Allen*, 8 Mass., 273; *Brissell v. Briggs*, 9 Mass., 462; *MeJway v. Needham*, 16 Mass., 157; *Hall v. Williams*, 6 Pick., 247; *Aldrich v. Kinny*, 4 Conn., 380, 385; *Wood v. Watkinson*, 17 Conn., 500; *Warren Manufacturing Co. v. Aetna Ins. Co.*, 2 Paine, C. C. R., 501; *Lawrence v. Jarvis*, 32 Ills., 304; *Kerr v. Kerr*, 41 N. Y., 272.) On the question of a divorce obtained in a State other than that in which

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the applicant is an inhabitant. (*Harteau v. Harteau*, 14 Pick., 181; *Inhabitants of Hanover v. Turner*, 14 Mass., 227; *Brown v. Brown*, 1 McCarter, 78; *Lorley's Case*, 2 Clark & F. (House of Lords), 567, note; Russell & Ryans' Crown Cases, 237; Story's Con. of Laws, §§ 228, 230; 2 Smith's Lead. Cases (5th Amer. ed.) 606; *Touey v. Lindsley*, 1 Dowl., 140.) The question whether the Illinois court had jurisdiction over the person and over the subject, is open to inquiry. (*Lawrence v. Jarvis*, 32 Ill., 304.) Consent does not confer jurisdiction. (*Dred Scott v. Sandford*, 19 How. U. S., 402; *Grocers' National Bank, v. Clarke*, 31 How., 123.) When a statute prescribes the mode of acquiring jurisdiction, the mode pointed out must be complied with, or the judgment is a nullity. (*Bloom v. Burdick*, 1 Hill., 130; *Stanton v. Ellis*, 12 N. Y., 575; *Miller v. Brinkerhoff*, 4 Denio, 120; *Kerr v. Kerr*, 41 N. Y., 272; *Winship v. Winship*, 1 Green, N. J., 107.) Foreign laws are regarded as facts, and are to be proved. (*Monroe v. Douglass*, 1 Seld., 447.) Any one whose interest or rights are in any way affected by a judgment (such as the one in question), may impeach it by a direct action. (*Van Alstyne v. Erwine*, 1 Kern., 338; *Decker v. Bryant*, 7 Barb., 182; *Kerr v. Kerr*, 41 N. Y., at page, 275; *Sidensparker v. Sidensparker*, 52 Maine, 481; *De Armond v. Adams*, 25 Ind., 455.) A father has sufficient interest to institute a suit to nullify his daughter's marriage. (*Bevan v. McMahon*, 5 Jurist. N. J., 686; 28 Law Jour. Mat. Cas., 127; 2 Swabey and Tristram, 58.) In the absence of proof, the common-law is in force in all the States. (*White v. Knapp*, 46 Barb., 549.)

*John H. Reynolds*, for respondent. On the question of the jurisdiction of the Illinois court, and that the judgment rendered was not void. (*Lane v. Brommelman*, 17 Ills., 95; *Walker v. Rogan*, 1 Wis., 597; *Farrington v. King*, 1 Bradford, 182; *De Laney v. Reed*, 4 Iowa, 292; *Cole v. Butler*, 43 Maine, 401; *Kelly v. Mize*, 3 Smeed, 59; *Smith v. Knowlton*, 11 New Hamp., 192; *Farmers' L. and T. Co. v. McKin-*

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ney, 6 McLean, 1; *Simms v. Slocum*, 3 Cranch., 300; *Preston v. Clark*, 9 Geo., 244.) The judgment cannot be impeached collaterally. (*Tilford v. Barney*, 1 Iowa, 575; *People v. Downing*, 4 Sandf., 193; *Lamprey v. Nudd*, 9 Foster (N. H.), 229; *Wesson v. Chamberlain*, 3 Comst., 332; *Maxwell v. Pittinger*, 2 Green, 156; *Anderson v. Fry*, 6 Indiana, 76; *State v. Conolly*, 6 Iredell, 243; *Miller v. Barkeloo*, 3 Eng., 318; *Brown v. Byrd*, 3 Eng., 384; *Cropsey v. McKinney*, 30 Barb., 48; *Burnsteed v. Reed*, 31 Barb., 669; *Barron v. Fait*, 18 Ala., 668; *Mobley v. Mobley*, 9 Geo., 247; *Wright v. Marsh*, 2 Green, 94; *Rancoul v. Griffie*, 3 Md., 54; *Mills v. Dickson*, 6 Rich., 487; *Vanderpoel v. Van Valkenburgh*, 2 Seld., 190; *Cyphert v. McClure*, 22 Tenn., 195.) The court has never claimed jurisdiction to grant any such relief. (*Sugnet v. Phelps*, 48 Barb., 566.) Morality and decency require its refusal in the present case. (See *Singer v. Singer*, 41 Barb., 140.)

CHURCH, Ch. J. The question is whether the plaintiff has stated in his complaint facts sufficient to entitle him to a judgment declaring the marriage contract between him and the defendant void. The statute declares that such judgment may be pronounced for the following (among other) causes:

"That the consent one of the parties was obtained by force or fraud."

"That the former husband or wife of one of the parties was living, and that the marriage with such former husband or wife was then in force."

As to the first ground, it is scarcely claimed that the allegations of the complaint are sufficient to make a case of fraud under the statute, and the only ground insisted upon to sustain the action is that, at the time of the marriage with the plaintiff, the defendant had a husband living by a former marriage *then in force*. If the Illinois judgment was binding upon the parties to it, and if the defendant and her former husband were divorced by that judgment, as between themselves, their marriage was *not in force* when the plain-

tiff and defendant were married. The complaint alleges that the husband went to Chicago and filed his bill in a court of equity, and that the defendant appeared and put in an answer denying the equities of the bill, and that afterward, by collusion, a decree of divorce was entered as though no answer had been interposed.

The court had jurisdiction of the subject-matter of the action; that is, it had jurisdiction to decree divorces according to the laws of that State; and every State has the right to determine for itself the ground upon which it will dissolve the marriage relation of those within its jurisdiction. The court also had jurisdiction of the parties by the voluntary appearance of the defendant. These are the facts stated. It is true that the complaint states that an answer not replied to is taken as true, according to the laws of the State of Illinois and the practice of the court, and "in consequence thereof the said court could not entertain jurisdiction of said case." It is also alleged in general terms that the judgment was void in the State of Illinois. These are statements of law and not of facts, and the sufficiency of a pleading is to be determined by facts stated, and not by the conclusions of law averred, and the facts only are deemed to be admitted by a demurrer. In *Starbuck v. Murray* (5 Wend., 159), MARCY, J., said: "That part of the plea in this case which alleges that the defendant was not bound by the laws or in any manner subject to the jurisdiction of Massachusetts, is a statement of law, and not of fact. \* \* \* It is a question of law whether he was bound by the laws of Massachusetts or subject to the jurisdiction of its courts. Although the defendant was not in the State, he might have authorized the entry of his appearance."

The logic of the complaint seems to be that because the answer was not replied to, the court was ousted of all further jurisdiction in the case, although both parties had appeared and the subject of the action was properly cognizable by the court. This position cannot be sustained. The answer might have been withdrawn or waived in open court, or a decree

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entered by consent. Having jurisdiction of the subject-matter and of the parties, the other questions relating to the pleadings and the form and manner of procedure were matters of regularity merely, for which the judgment cannot be questioned collaterally. In *Shattenkirk v. Wheeler* (3 J. C. R., 276), the court said: "There is no case in which equity has ever undertaken to question a judgment for irregularity." It is insisted that the Illinois court had no jurisdiction, because the plaintiff in that action was not a *bona fide* resident of that State. The averments in the complaint on this subject are not very explicit. The complaint states that Pomeroy resided in Massachusetts and went to Chicago in 1854 or 1855 for the purpose of procuring a divorce and evading the laws of Massachusetts. It does not state in terms that he did not reside in Illinois at the time of filing his bill; but it does state that the defendant put in an answer in July, 1855, denying that her husband ever became a resident of Illinois, but that he went there with a view of claiming the benefit of the laws of Illinois concerning divorces, and that he was in fact a resident of New York. It is probable that the pleader intended to adopt the allegations of the defendant in that action as the allegations of the plaintiff in this.

Viewing them in the most favorable light for the plaintiff, the question is presented whether the Illinois decree can be attacked in this State in a collateral action because the plaintiff in that action was not actually a *bona fide* resident of that State at the time. I think not. It is conceded he was there, appeared in that court and filed his bill, and took the decree. The question whether he was a resident there, so as to enable him to file his bill, was for that court to determine, and although it may have decided erroneously, the decision cannot affect the validity of the judgment. The *status* of all persons within a State is exclusively for that State to determine for itself. It is unnecessary to say what the effect might be, if it was alleged that Pomeroy had never been within the State, although he may have authorized the bill to be filed; but it is conceded he was there, and sufficient facts are alleged to

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give the Illinois court power to decide the question of domicile, and the judgment is not void, if we concede that the decision was erroneous, and if it is also conceded that the question of residence is vital to give jurisdiction. A wrong decision does not impair the power to decide, or the validity of the decision when questioned collaterally. But, aside from this consideration, we have a judgment rendered nearly sixteen years ago, of a court of one of the States of the Union having jurisdiction of the general subject-matter of the action, which decrees a divorce of the marriage contract between the defendant and her former husband. I think such a judgment is protected by the Constitution of the United States, which declares that "full faith and credit shall be given in each State, to the public acts, records and judicial proceedings of every other State." This means that it must have the same faith and credit as it has in the State where it was rendered. It must, however, be a judgment, and the parties and subject-matter must be within the jurisdiction of the court. Such judgments may be impeached for want of jurisdiction, and, also, for fraud, which will be hereafter noticed. (*Starbuck v. Murray*, 5 Wend., 148; *Kerr v. Kerr*, 41 N. Y., 272, and cases there cited.)

Until 1813, the courts of this State held that such judgments stood on the same footing as foreign judgments. (*Shumway v. Stillman*, 6 Wend., 447, and cases there cited.) But in *Mills v. Duryee* (7 Cranch., 481), it was decided by the Supreme Court of the United States, that *nil debet* was not a good plea to such a judgment, and that it had the same conclusiveness in every other State as in the State where it was rendered. Since that time, the decisions have been modified so as to conform to that case. In *Shumway v. Stillman*, *supra*, SAVAGE, J., says: "An examination of the cases results in the establishment of the following proposition: That the judgment of a court of general jurisdiction, in any State of the Union, is equally conclusive upon the parties in all the other States, as in the State in which it was rendered. This, however, is subject to two qualifications. 1st.

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If it appear, by the record, that the defendant was not served with process, and did not appear in person, or by attorney, such judgment is void; and, 2d. If it appear by the record that the defendant appeared by attorney, the defendant may disprove the authority of such attorney to appear for him."

If there is no appearance in fact, there is no judgment, it is a nullity.

Since that time, the courts have steadily adhered to this position. In *Bicknell v. Field* (8 Paige. 445), the chancellor said: "It is at least doubtful whether any court in this State has any right or power to inquire into the regularity of a judgment recovered in one of the Superior Courts of a sister State, after a personal service of the process upon the party against whom such judgment was obtained." In *Dobson v. Pearce* (12 N. Y., 156), it was held that the record of a judgment of a sister State, when the parties appeared, is conclusive in this State as to the subject-matter of the action, and as to all questions litigated. A judgment of a sister State cannot be impeached by showing irregularity in the forms of proceeding, or a non-compliance with some law of the State where the judgment was rendered relating thereto, or that the decision was erroneous. Jurisdiction confers power to render the judgment, and it will be regarded as valid and binding until set aside in the court in which it was rendered. (12 N. Y., *supra*.)

It is insisted, however, that the judgment is void for fraud. It is alleged, in the complaint, that after the pleadings were in, a decree was taken *pro confesso* by collusion, which I infer means by consent or agreement of the parties.

It is a rule well settled, that every judgment may be impeached for fraud, and this applies as well to judgments of our own State, as to those of other States or foreign judgments; but what will constitute fraud sufficient to vitiate a judgment, and who can make the objection, and under what circumstances it can be interposed, are material questions.

The rule is that there must be facts which prove it to be against conscience to execute the judgment, and which the



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injured party could not make available in a court of law, or which he was prevented from presenting by fraud or accident, unmixed with any fraud or negligence in himself or his agents. (Story's Eq. Jur., § 887.) This decree was binding upon the parties to it, within this rule. No fraud is alleged by either against the other, and neither could assert that it was not a valid judgment, as they were both equally guilty of the fraud. (Bishop on Marriage, § 706.) It effectually divorced the parties to it, and their marriage was no longer in force in any legal sense. The plaintiff in this action has not been defrauded, nor is he injured by it.

The plaintiff was entitled to marry a marriageable person, and though she may not have been, in other respects, all he anticipated or all that was desirable; yet she was competent to marry, because her former marriage was not *then in force*, and being competent, it is of no legal consequence to the plaintiff how she became so. Conceding fraud as alleged, he cannot avail himself of it. His success in this case would have no effect upon the status of the former husband, while the position of the defendant would be anomalous. By the judgment in this action, she would be declared the wife of her former husband, and by the judgment of another court, equally binding upon her, she would be declared not to be his wife. She could not claim marital rights from either husband, and it would be, at least, hazardous to marry another.

I have been unable to find any authority sanctioning a principle which will uphold this action. It is claimed that the case of *Jackson v. Jackson* (1 J. R., 424), is a direct authority in favor of it. In that case the parties were married and resided in this State. The wife went to Vermont and filed a bill for a divorce, for causes not sufficient to authorize a divorce in this State. The husband appeared and defended the action, which resulted in a decree of divorce and a judgment for alimony, upon which the wife brought an action in this State to recover the alimony. The court decided against a recovery, on the ground that the wife could not acquire a domicile in Vermont separate from her husband, and also on the

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ground that the parties went there to evade the laws of this State, and the courts here would not enforce the judgment. It will be seen that the facts in material points are quite unlike this case. Here it does not appear where the parties were married, but it does appear that they did not reside here, but in Massachusetts, and that the laws of that State and not this were evaded, and in that case the action was directly upon the judgment.

But I am unable to see how that case can be sustained in the light of the later decisions. In the first place, I am not prepared to assent to the proposition that a wife may not have a domicile separate from her husband, when she has a cause for a divorce, and her separate and antagonistic interests are thus concerned. (Bishop on Marriage, §§ 728, 730.) Nor can I assent to the reason given for allowing the husband to repudiate the binding force of the judgment upon him, after voluntarily submitting himself to the jurisdiction of the court, and litigating the case upon its merits. As to him, the questions litigated were *res adjudicata*.

It is to be regretted that marriage and divorce laws are not uniform in all the States, and we think they should all conform to the laws of this State; but we must never fail to remember that the States are equal in power, and that each State has the same right to exercise its judgment in the passage of laws, on this and every other subject, that our own State has; and in dealing with questions of this character, it is gratifying to know that the requirements of the Constitution accord with the principles of the "golden rule."

It is now well settled that the *lex loci* which is to govern married persons, and by which the contract is to be annulled, is not the law of the place where the contract was made, but where it exists for the time, where the parties have their domicile, and where they are amenable for any violation of their duties in that relation. (Story's Conflict of Laws, § 230a.)

The judgment sustaining the demurrer must be affirmed.  
All concurring, judgment affirmed.

## Statement of case.

PHILIP W. CRATER, Respondent, v. ABRAHAM N. BININGER,  
Appellant.

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| 45  | 545 |
| 114 | 508 |
| 45  | 545 |
| 116 | 261 |
| 45  | 545 |
| 135 | 505 |
| 45  | 545 |
| 126 | 416 |
| 45  | 545 |
| 128 | 39  |

Where money is advanced by a partner under no legal obligation to do so, although to be used in the partnership business, he has a right to impose conditions, and prescribe the security for the advance, and the contract then made cannot be varied by any cotemporaneous or prior verbal agreement, or affected by the business relations of the parties.

There is no rule forbidding one partner to sue another at law in respect of a debt arising out of a partnership transaction, if the obligation or contract, though relating to the partnership business, is separate and distinct from all other matters in question between the partners, and can be determined without going into the partnership accounts.

The plaintiff being interested in a joint stock company (unincorporated), and the company needing money to pay debts accrued in the partnership business, the defendant and S., being also interested and principal managers of the company, applied to the plaintiff to raise money for that purpose at the bank upon the note of the defendant, payable to and indorsed by S. This he did, and the note being unpaid at maturity, he paid and took a transfer thereof.—*Held*, that he could recover the amount thereof against the defendant, and that parol evidence to show that, at the time the note was made, the plaintiff agreed to pay one-third of it, was inadmissible to vary the contract.

(*Gridley v. Dole*, 4 Comst., 486, approved.)

(Argued April 24th; decided May 23d, 1871.)

APPEAL from the judgment of the General Term of the Supreme Court, in the first judicial district, affirming the judgment upon a decision of the judge without jury in favor of the plaintiff.

The action is against the defendant as maker of a promissory note to the order of and indorsed by one Sanger. The plaintiff, defendant, Sanger, and several others composed a joint stock association (unincorporated), known as the Oil Creek Petroleum Company. In their operations, the company became indebted to their agents and employees, and this note was made for the purpose of raising money to pay off the indebtedness of the company, and was discounted by a bank in New Jersey, and on its maturity was paid by the plaintiff, to whom it was transferred. The defence was that

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Opinion of the Court, per ALLEN, J.

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the plaintiff agreed, at the time of the making of the note, to provide for and pay one-third thereof, if the company should not be in funds for that purpose when it became due. Some evidence of such an agreement was given by the defendant. The cause was tried by the court without a jury, and judgment was given for the plaintiff, which was affirmed at General Term of the Supreme Court.

*Simeon E. Church*, for the appellant, cited *Ives v. Miller* (19 Barb., 196); *Francisco v. Fitch* (25 Barb., 130); *Sherwood v. Barton* (36 Barb., 284); *Traders' Bank of Rochester v. Bradner* (43 Barb., 379); *Freeland v. Van Campen* (38 N. Y., 39).

*Samuel Hand*, for the respondent. On the question that parol evidence could not vary the note. (*Chitty on Bills*, 47; *Hoare v. Graham*, 3 Camp., 57; *Rutand's Case*, 5 Rep., 25; *Parsons on B. & N.*, vol. 2, p. 501; *Sice v. Cunningham*, 1 Cow., 397; *Babson v. Webber*, 9 Pick., 163; *Eaves v. Henderson*, 17 Wend., 190; *Ely v. Kibborn*, 5 Den., 514.) Upon the question of the note being to raise money for partnership purposes. (*Gridley v. Dole*, 4 Comst., 486; *Vanness v. Forrest*, 8 Cranch., 30.)

ALLEN, J. The defendant and Sanger, the indorser of the note in suit, were the active promoters and principal managers of the company for whose benefit, it is claimed, the note was made. The other associates, including the plaintiff, appear to have had but slight personal connection with the business of the association. There is no evidence that the plaintiff was at any time a party to the note as indorser, or otherwise. His agency was confined to the discounting, or the procuring the same to be discounted by a New Jersey bank. If there is any evidence that he undertook to provide for or pay any part of the note, it is very slight. The only witness to the fact is the defendant, and after stating very generally that he understood that himself, Sanger and the plaintiff should take care of the note, but without being able to refer to any con-

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Opinion of the Court, per ALLEN, J.

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versation with the plaintiff from which he formed his opinion, he finally said, "I will not swear positively that Mr. Crater said he would pay one-third of the note, but I understood Sanger so, and it was implied that we three were to take care of the note," and there left it. The evidence came very far short of proving any agreement by the plaintiff to relieve the defendant from the liability he assumed as maker of the note. The judge, upon the trial, with the assent of the parties, discharged the jury, and himself decided the issues of fact and law. He does not find that an agreement was made by the plaintiff as alleged, nor was there any request to find such fact, or exception to the refusal or omission to pass upon the question. Neither is there any fact found, showing any connection of the plaintiff with the origin or consideration of the note, or any business relation or connection between the plaintiff and defendant. The judge merely finds the making of the note by the defendant, and the indorsement thereof by the payee to the plaintiff before maturity, and for value and the amount due and unpaid thereon. But if the facts alleged had been proved upon the trial and found by the judge, they would have constituted no defence. It was incompetent for the defendant to vary the terms of the note, or relieve himself from liability thereon, in whole or in part, by evidence of a verbal agreement made before or at the time of making the instrument. (*Ely v. Kilborn*, 5 Denio, 514; *Evans v. Henderson*, 17 W. R., 190.)

The relation of the parties to each other as partners with others, in connection with the fact that the note was made for the business purposes of the partnership, and that the money realized from its discount was applied to the payment of the debts of the association, presented no obstacle to an action upon the note by the plaintiff, who had advanced the money upon the credit of the parties to it. The note was not a partnership note; it was not given by or to the firm. It was given by one member of the partnership to another, upon a good consideration, and an action upon it did not involve an examination of the partnership accounts. In *Van*

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Opinion of the Court, per ALLEN, J.

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*Ness v. Forrest* (8 Cranch., 30), it was held that a promissory note given by one member of a commercial company to another member for the use of the company, would maintain an action at law by the promisee in his own name against the maker, notwithstanding both parties were partners in that company, and the money when received would belong to the company. A case in more close analogy to this, as the facts are claimed by the defence, is *Gridley v. Dole* (4 Comstk., 486). There one of two partners, after dissolution of the copartnership, had advanced money to the other to be applied in payment of the partnership debts, taking a promissory note for the money advanced. Evidence of a contemporaneous verbal agreement that the note should be paid out of the effects of the firm, and if such effects were not sufficient, then that the lender should pay a portion of the note, was held inadmissible. An action will not lie by one member of a partnership against another upon an implied promise, and if the plaintiff had paid the demands against the firm, he could not have maintained an action against his associates upon the implied promise to repay him; but one partner can maintain an action against his copartner upon an express promise, although connected with the partnership business. (*Townsend v. Goewey*, 19 W. R., 424.) Judge GARDNER, in *Gridley v. Dole*, *supra*, says: "If one partner gives the other his promissory note or separate acceptance for value received, on the partnership account, an action will lie on such note or bill." Citing Collyer on Partnership, § 269, and 1 Anst., 50.

If the evidence is referred to, it will be seen that the plaintiff refused to advance the money except upon a note made by the defendant and indorsed by Sanger; and as he was under no legal obligation to advance the money, he had a right to impose the conditions and prescribe the security, and the contract then made cannot be varied by any contemporaneous or prior verbal agreement, or affected by the business relations of the parties. (*Lindley on Part.*, 735; *Fox v. Frith*, 10 M. & W., 131; *Bedford v. Brutton*, 1 Bing. N. C., 399; *Sedgwick v. Daniell*, 2 H. & N., 319.) There is no rule forbidding

## Statement of case.

one partner to sue another at law in respect of a debt arising out of a partnership transaction. If the obligation or contract, though relating to the partnership business, is separate and distinct from all other matters in question between the partners, and can be determined without going into the partnership accounts, an action will lie by one partner against his copartner. (*Worrall v. Grayson*, 1 M. & W., 166.) The advance of the money upon the security of the note in suit for a special purpose connected with the partnership business was separate and distinct from the general partnership dealings, and an action upon it does not involve an examination of the partnership accounts. It was an independent transaction between two of several partners, and the contract is valid and may be enforced at law. The judgment should be affirmed.

All concurring except RAPALLO, J., not voting.

Judgment affirmed.

E. BUSHNELL ELWOOD et al., Respondents, v. THE WESTERN UNION TELEGRAPH COMPANY, Appellant.

The general rule is well settled that, where unimpeached witnesses testify distinctly and positively to a fact and are uncontradicted, the jury are not at liberty to discredit their testimony when opposed to a mere presumption to the contrary; but this is subject to the exception that where the statements of the witness are grossly improbable, or he has an interest in the question at issue, courts and juries are not bound to refrain from exercising their judgment, and to blindly adopt the statements of such witness. (RAPALLO, J.)

It is gross negligence in the operator at a telegraph station to send over the wires a message in the name of, and purporting to come from a cashier of a bank and to be dated at another station, at the request of a party known to the operator not to be such cashier, and presenting no evidence of authority to use his name, which message, addressed to a banking house, held out such party as entitled to credit for a large amount; and this negligence occurs so within the scope of the employment of such operator as to make the telegraph company liable to the person to whom such telegram was addressed for the damages occasioned by such negligence.

(Argued April 5th, and decided May 23d, 1871.)

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|-----|-----|
| 45  | 549 |
| 111 | 300 |
| 45  | 549 |
| 119 | 550 |
| 45  | 549 |
| 121 | 683 |
| 45  | 549 |
| 123 | 800 |
| 45  | 549 |
| 134 | 422 |

|     |     |
|-----|-----|
| 45  | 549 |
| 167 | 374 |

## Statement of case.

APPEAL from a judgment of the late General Term of the Supreme Court, in the eighth judicial district, affirming judgment for \$13,193.94 in favor of the plaintiffs.

This was an action for damages sustained by the plaintiffs, who paid the sum of \$10,000 on the faith of what was claimed to be a false and fraudulent message, negligently sent by the defendant, and delivered to the plaintiffs, who were bankers at Pithole, Pa. The defendant had an office at that place, as well as at Titusville, Pa. On the morning of the 12th of August, 1865, between eleven and twelve o'clock, the plaintiffs received a message from the defendant's office at Pithole, as follows:

"From Erie, Pa. Dated August 12th. Forwarded from Titusville, 12 m. Received August 12th, 1865.

"To Prather, Wadsworth & Co., Pithole.

"Keystone bank will pay the checks of T. F. McCarthy, to the amount of twenty thousand dollars (\$20,000).

"(Insured.)

KEYSTONE BANK."

The plaintiffs took it to the defendant's office; saw the operator at Pithole, and told him that they had brought another blundering message; that the name of the officer of the bank had been omitted. The operator looked at the original, and said it was the fault of the other end. Plaintiff told him to send to Erie, to the bank, and get the name of either the president or the cashier to the message. The operator said it was the fault of the office at Titusville, and he agreed to send to that office and get the signature of the officer of the bank. This was done, and between three and four o'clock in the afternoon, there was received at the office at Pithole, and sent to the plaintiffs the following message:

"From Erie, Pa. Dated August 12, 1865. Forwarded from Titusville, 12 m. Received August 12, 1865.

"To Prather, Wadsworth & Co.

"Keystone bank, will pay the checks of T. F. McCarthy, to the amount of twenty thousand dollars (\$20,000).

"JOHN J. TOWN,

"Cashier of Keystone Bank."



## Statement of case.

Just before five o'clock on the same afternoon, McCarthy presented himself at the plaintiff's banking house, and drew his check for \$20,000 on the Keystone Bank, on which the plaintiffs paid him \$10,000, and placed \$10,000 to his credit. McCarthy was never seen at Pithole afterward. On the 14th the plaintiffs learned from Mr. Town that the whole transaction was fraudulent and a forgery, and that no such telegram had ever been sent or authorized by him. It was proved that no such messages had been received at Titusville from Erie; that the operators there knew that fact; that both messages were written at Titusville, by McCarthy, at the office of the company; that the operators there knew they were so written by him before they were sent to Pithole; that McCarthy was known by that name to the operators at Titusville. The operators at the Titusville office swore positively that they did not send the second message, and it was also attempted to be shown that there was a break in the line, so that the message could not have been sent at the time it was claimed to have been. The question of fact was submitted to the jury, and found against the defendant. It was suggested by the defendant, and insisted upon, that a confederate of McCarthy's had cut the wire, and, by inserting a machine, had telegraphed the message. No proof of this, however, was offered. A third message was claimed by the operators at Titusville to have been sent from Titusville by McCarthy, as follows.

"ERIE, 10th, 186 .

"To T. F. McCarthy. Forwarded from Titusville, 11th.

"I have made arrangements at Keystone Bank for you to draw on me at sight.

"H. W. HAMLIN.

"J. J. TOWN, *Cashier*."

The evidence on this subject is fully referred to in the opinion.

*G. P. Lowry*, for the appellant. If a presumption be verified, it is superseded; if it is contradicted, it is destroyed. (Burrill on Cir. Ev., p. 36.) A presumption stands till the contrary is proved, and no longer. (3 Bl. Com., 371; see

selves as to deprive them of credit, however positively made. The witnesses, though unimpeached, may have such an interest in the question at issue as to affect their credibility. The general rules laid down in the books at a time when interest absolutely disqualified a witness, necessarily assumed that the witnesses were disinterested. That qualification must, in the present state of the law, be added. And furthermore, it is often a difficult question to decide when a witness is, in a legal sense, uncontradicted. He may be contradicted by circumstances as well as by statements of others contrary to his own. In such cases, courts and juries are not bound to refrain from exercising their judgment and to blindly adopt the statements of the witness, for the simple reason that no other witness has denied them, and that the character of the witness is not impeached.

Very clear and decisive evidence was required in this case to establish that the message which came over the defendant's wires was not communicated in the natural and ordinary manner. From the necessity of the case, such evidence as there is to that effect proceeds wholly from parties having an important interest in the question. Each of them, if guilty of the negligent act, would have the strongest motive to deny it, as the admission would subject him or her to severe responsibility for the consequences. This is a controlling consideration in determining whether the statements of these witnesses should be taken as conclusive. Without imputing a want of truthfulness to these witnesses, we think that their relation to the subject-matter in controversy was of itself sufficient to take from the court the right to dispose of the case upon their evidence and to require that the jury should pass upon the weight to be given to their statements. There is also a want of distinctness in the statements of the witnesses, irrespective of any question of credibility.

The defendants claim that each of the operators positively denies sending the message in question. This, however, is not perfectly clear. Mary J. Carr testifies that McCarthy handed a message to Reynolds, who handed it to her to send,

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Opinion of the Court, per RAPALLO, J.

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and that she sent it, the whole of it; that she and Reynolds were in the office when it was handed to her; that it purported to come from Erie. She does not know to whom it was addressed, and she thinks it was signed by the cashier of a bank. The one signed "Keystone Bank" (Ex. B., 1) was shown to her, and she says she did not send that. A transcript of a message from Hamlin to McCarthy of August 10th was then shown to her. It is in these words:

"ERIE, 10th, 186 .

"To T. F. McCarthy. Forwarded from Titusville 11th. I have made arrangements at Keystone Bank for you to draw on me at sight.

"H. W. HAMLIN.

"J. J. TOWN, *Cashier*."

The name of J. J. Town, cashier, appears on the left hand side of the transcript of that message. She says she thinks that is the one she sent. That that is the one that McCarthy handed in, and that she sent. Yet that was a telegram addressed to McCarthy himself, and not designating any place to which it was to be sent. There is much obscurity about this testimony. If the message contained in that paper, arrived at Titusville in McCarthy's absence, and was forwarded to him at some other place, and the paper shown was the transcript of the telegram received by McCarthy, it would be intelligible. But it is difficult to understand how he being present could have handed it in as a message to be telegraphed to himself, or how Miss Carr could send it, it not being directed to any place. The incongruity of this statement is, of itself, sufficient to cast a doubt upon its accuracy. If Miss Carr is mistaken, then, in saying that that is the message which McCarthy handed in and she sent, then her testimony that she did send one, which was handed in by him and signed by the cashier of a bank, is open to the construction that the message telegraphed by her was the message in controversy. It is shown that she was in the Titusville office on the afternoon in question; that she was the operator there in the daytime, and she has not expressly denied sending the message

in dispute. It was not shown to her at the trial, nor was she directly interrogated in respect to it. She was only shown the message B, No. 1, and the Hamlin message.

The recollection of Reynolds also seems to be very inaccurate. He speaks of forwarding to Pithole, the message which McCarthy had received from Erie, signed Hamlin, changing the signature and addressing it Prather, Wadsworth & Co., and says that the body of the dispatch was the same, substantially, as those of the 12th of August, and addressed to the plaintiffs. (Exhibits B., 1 & B., 2.) Yet, on inspection, it is apparent that the purport of the message of the 12th, was very different from that of the Hamlin message.

The evidence as to the duration of the break in the line, is entirely too uncertain to be regarded as conclusive. It consists of an estimate of time without disclosing any events by which it was marked or could be accurately measured.

The proof relied on as negating the sending of the message from the Titusville office, is far from being of that clear and satisfactory character which would justify the court in determining it to be conclusive. The question was therefore properly submitted to the jury.

That the sending of such a message in the name of the cashier of a bank, at the request of the party who was thereby held out as entitled to credit for a large amount, without any evidence of his authority to use the name of the cashier, it being dated at Erie, though known to have originated at Titusville, was an act of gross negligence, is too clear to admit of argument.

The act was done in the direct course of the employment of the agent. The agent was placed in the office, and in the control of the instruments, to use them in transmitting messages for a compensation. If the agent performed that duty in a negligent manner, whereby the plaintiff was injured, the principal is clearly liable. Transactions of the most important character are daily carried on by means of telegraphic communication, and the confidence which the public is invited to and does repose in the care with which the proprietors of

## Statement of case.

these lines conduct the business, is a source of large remuneration to such proprietors. They incur a corresponding degree of responsibility, and must be held to the exercise of such care and caution as it is in their power to employ, in order to avoid being made the instruments of deception and fraud.

The question sought to be raised on the argument as to the liability of the defendant in case the act by which the plaintiff was injured were a willful wrong of the defendant's operator, is not properly before us for adjudication. The only mode in which that point was attempted to be raised on the trial, was by the motion for a nonsuit. One of the grounds of nonsuit specified was, that the defendant was not chargeable for the willful fraud of its operator. The court could not determine as matter of fact that the operator was a party to the fraud, or acting in collusion with McCarthy, and, therefore, could not properly nonsuit on that ground. If the defendant desired to have that question passed upon, he should have requested the court to submit it to the jury, and to charge as to the effect of a finding in favor of the defendant upon that point. No such request was made, and it is not necessary, therefore, now to consider what instruction should have been given in that respect, if applied for.

The remaining points are fully discussed in the opinions rendered at the General Term, and we agree with their conclusions.

The judgment should be affirmed with costs.

All concurring except FOLGER, J., who did not sit.

Judgment affirmed.

ABRAHAM COX, Respondent, v. SARAH JAMES, Appellant.

Where the owners of lands cause them to be surveyed and subdivided into lots for building purposes, and a map thereof to be made, upon which the lots were designated by numbers, and abutted at one end upon a strip designated as an alley, and such owners subsequently conveyed one of the lots, describing it by number on a map, specifying the map above mentioned, and specifying the boundaries as abutting at one end on the north

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| 45  | 557 |
| 108 | 508 |
| 45  | 557 |
| 116 | 189 |
| 45  | 557 |
| 118 | 170 |
| 118 | 171 |
| 45  | 557 |
| 127 | 229 |

## Statement of case.

line of such alley, as laid down in the map,—*Held*, that this conveyance gave to the grantee a right of way over the alley to the rear of his lot, as against his grantors and their subsequent grantee of the alley.

In an action involving the title to lands, the defendant, who is in possession under a quitclaim deed, cannot dispute the seizin of his grantor, at the time of giving the deed.

To authorize a reversal of a finding of fact in this court, on the ground that there is no evidence to sustain it, it must appear that the case contains all the evidence. GROVER, J.

(Argued May 17th; decided May 23d, 1871.)

APPEAL from the judgment of the late General Term of the Supreme Court, in the fourth judicial district, affirming the judgment of the Special Term, rendered on the report of a referee in favor of the plaintiff.

This action was brought to establish the right of the plaintiff to the use of an alley on the south side of his lots, in the village of Saratoga Springs. The lots were conveyed by one Maxwell and wife to the plaintiff. Maxwell had a map of the property made, upon which was laid out an alley sixteen feet in width, called "South alley." The description in the deed referred to the map, and bounded the south side of the property "along the north line of South alley." The plaintiff claims to the centre of "South alley," and if not entitled that, then, that the land immediately south of the said lots be always kept open as an alley. The defendant claims the whole land embraced in the alley as absolutely her own by a subsequent conveyance from Maxwell's wife to her, and she has fenced it into her own lot and wholly excluded the plaintiff therefrom. The other facts are sufficiently stated in the opinion of GROVER, J.,

*Amasa J. Parker*, for the appellant. On the question of want of proof to sustain the findings. (*Mason v. Lord*, 40 N. Y., 476; *Baker v. White*, 3 Keyes, 617.) On the question of boundary. (*Child v. Starr*, 4 Hill, 369; *Jackson v. Hathaway*, 15 Johns., 454; 20 Wend., 149; *Anderson v. James*, 4 Rob., 35; *Sizer v. Devereaux*, 16 Barb., 160; 1 Johns., 145; 6 Wend., 465; 19 Wend., 323; 20 Wend., 96.) See, as to the right of way claimed 3 Kent, 421, 507; *Holmes v. Seeley*

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(19 N. Y., 507); Willard on R. E., 255; 2 Seld., 257; 16 Barb., 251; 26 Barb., 630; *Holdane v. Cold Spring* (21 N. Y., 474).

*A. Pond*, for the respondent. The deed conveyed to the centre of the alley. (*Perrin v. N. Y. C. R. R. Co.*, 36 N. Y., 120; *Bissell v. Same*, 23 N. Y., 61; *Varick v. Smith*, 9 Paige, 547; *Holland v. Trustees, etc.*, 21 N. Y., 474; *Hennessey v. Old Colony R. R. Co.*, 101 Mass., 541; *Anderson v. James*, 4 Rob., 35; *Child v. Starr*, 4 Hill, 369; *S. C.*, 20 Wend., 149; *Sizer v. Devereaux*, 16 Barb., 160; *Smyles v. Hastings*, 22 N. Y., 222; *Herring v. Fisher*, 1 Sandf., 344; *Child v. Chappell*, 5 Seld., 246, 257; *Marsh v. Burt*, 34 Vt., 289; *Lozier v. N. Y. C. R. R. Co.*, 42 Barb., 468.) The plaintiff had at least a right of way. (*Badeau v. Mead*, 14 Barb., 328; 16 Barb., 107, 109; 1 Wend., 262; 2 Wend., 472; 19 Wend., 128; 1 Hill, 189, 191; 17 Mass., 413; 4 Allen, 206; 101 Mass., 540; 7 Gray, 83; 2 Seld., 257, 267.) When both parties trace their title to the same source, neither will be permitted to attack the title of their common author. (2 Hilliard on Real Property, 265; 1 R. S., 690, § 144; *Moseley v. Moseley*, 15 N. Y., 334; *McBurney v. Cutler*, 18 Barb., 204; *Bennett v. Couchman*, 48 Barb., 73; *Thomas v. Poole*, 7 Gray, 83, 85; *Jackson v. Parkhurst*, 9 Wend., 209.) Mrs. Maxwell was bound by the recitals in the joint deed with her husband. (*Grant v. Townsend*, 2 Hill, 554; *S. C.*, 2 Denio, 336; *Constantine v. Van Winkle*, 6 Hill, 177; *Bool v. Mix*, 17 Wend., 119, 128, 129; 1 Hilliard on R. P., 129, note; *Nash v. Sheppard*, 10 Metc., 192; *Raymond v. Holden*, 2 Cush., 264.) The findings of fact cannot be attacked in this court. (*Carman v. Pultz*, 21 N. Y., 547, 551; *Grant v. Morse*, 22 N. Y., 323, 324; *Hovey v. Kerr*, 8 Bosw., 196, 204.)

GROVER, J. The exception to the finding, by the referee, of the fact that Louisa A. Maxwell, at the time of and prior to her conveyance of lots forty-eight, forty-nine and fifty to the plaintiff, was the owner thereof, and of the piece of land known as South alley was not well taken. To render this

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Opinion of the Court, per GROVER, J.

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exception available in this court, the fact must be wholly unsupported by proof. (*Mason v. Lord*, 40 N. Y., 476; *Wegman v. Childs*, 41 id., 159.) It must appear that the case contains all the evidence given relating to such facts, otherwise it will not affirmatively appear that none was given tending so establish it. In the present case, it appears that a map was given in evidence of the lands in question, and of other lands in the possession of the plaintiff's grantors, showing that such lands had been surveyed and subdivided into lots by them. This map is not found in the case. It may have contained evidence as to the ownership as between Mr. and Mrs. Maxwell. But assuming that it contained no such evidence, the facts in question cannot be said to be wholly unsustained by proof as to South alley; it was proved that Mrs. Maxwell gave a quitclaim deed thereof to the defendant, who went into possession claiming under this deed. This, as against the defendant, was sufficient evidence that Mrs. Maxwell owned the land prior to and at the time of giving the deed. This deed was given to the defendant subsequent to the grant by Mr. and Mrs. Maxwell to the plaintiff of lots forty-eight, forty-nine and fifty. The conveyance to the plaintiff was by a joint warranty deed from both Mr. and Mrs. Maxwell, and was, therefore, evidence that they claimed the land in common, and their possession with this, would sustain a finding that they were so seized. If Mrs. Maxwell united in this conveyance as part owner of the lots for the purpose of conveying such interest therein, and was at the time the owner of South alley, her deed to the plaintiff gave him the same right of way in the alley, as though she had been sole owner of the lots, and had solely deeded them to the plaintiff. The defendant gave no evidence as to the title to the lots or of South alley. No motion was made to dismiss the complaint for want of proof of Mrs. Maxwell's title to the lots conveyed by her to the plaintiff. There is no more reason for a presumption that Mr. Maxwell was the owner, and that Mrs. Maxwell united with him in the deed for the purpose



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Opinion of the Court, per GROVER, J.

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of extinguishing her inchoate right of dower, than for a presumption that she was the owner, and Mr. M., her husband, united in the deed for the purpose of extinguishing his interest as tenant by the curtesy. As above remarked, the only legitimate presumption was that they were equal owners in common of the land. The question whether the lot conveyed to the plaintiff was bounded by the north side of or the center of the alley, is not material to the right claimed by the plaintiff in the action, which was a right of way over the alley, and the correctness of the legal conclusion of the referee upon this point will not be examined. The judgment declaring the plaintiff entitled to a right of way over the alley cannot be sustained upon the ground that he acquired the right as a way from necessity, for the reason that access might be had from the land conveyed to public streets; nor can it be sustained upon the ground that the alley had been dedicated to the public as a highway, for the reason that it had never in any way been accepted or used as such by the public. The only ground upon which the judgment can be sustained, is that the plaintiff acquired a right of private way over the alley as appurtenant to the lands conveyed to him by the Maxwells. This right had not become appurtenant to the lands in consequence of a previous user in connection therewith, the alley never having been so used. The substantial facts proved and found by the referee, are that the Maxwells, prior to their conveyance to the plaintiff, were the owners of a parcel of land, embracing the lands conveyed to the plaintiff, South alley and other lands; that they caused the said parcel to be surveyed and subdivided into lots, of suitable size for building purposes, and a map thereof to be made, upon which the lots were designated by numbers, and South alley designated as an alley, and afterward conveyed lots forty-eight, forty-nine and fifty to the plaintiff, describing lot fifty as all that certain lot situate in the village of Saratoga Springs, known and distinguished as lot number fifty on a map of village lots owned by the parties of the first part, referring particularly to the said map, and specifying the boundaries of

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the lot as laid down thereon, referring as follows to South alley: Thence to a stake in north line of South alley; thence along the north line of South alley, etc. South alley was laid down on the map as an alley running along the boundary of the lot sixteen feet in width, continuing along past the rear of lot fifty, and along other lots owned by the Maxwells. This conveyance of the lot, so made in reference to the map designating the strip as an alley, gave the plaintiff a right of way over the alley to the rear of his lot, as against his grantors and their subsequent grantee of the alley. (*In re Mayor*, 2 Wend., 472; *Smyles v. Hastings*, 22 N. Y., 217; *Badeau v. Mead*, 14 Barb., 328.) The question whether the plaintiff had not an adequate legal remedy for the disturbance of this right of this way does not arise, as it was not insisted upon in the answer. (*Roy v. Platt*, 4 Paige, 77; *Truscott v. King*, 2 Seld., 147.) The rights of the parties were established by the conveyances. This renders an examination of the exceptions taken by the defendant to other evidence introduced by the plaintiff unnecessary.

The judgment appealed from must be affirmed, with costs.  
All concurring, judgment affirmed.

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PATRICK CASSIDY, Respondent, v. AMOS D. LE FEVRE,  
Appellant.

The defendant purchased from the plaintiff an engine, boilers and other machinery. The engine and boilers were agreed by the plaintiff to be of the best material and workmanship and in perfect running order. No time was specified for their delivery, but they were to be approved by the defendants' engineer. The boilers, after delivery, were found defective; one of them collapsed at the first trial, and was rendered useless. The defects in the boilers were subsequently supplied by the plaintiff, with the consent of the defendant, and were then accepted by the defendant and approved by his engineer. — *Held*, that the original failure of the boilers was not, after their final acceptance, any defence in an action for the price. Such acceptance, however, was no waiver of a right of action for the damages occasioned by the explosion and loss of use of machinery,

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| 45  | 562 |
| 114 | 285 |
| 45  | 562 |
| 135 | 217 |
| 45  | 562 |
| 155 | 451 |

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and those damages might have been recouped in an action for the price by proper averments in the answer.

Such damages, however, were not the difference between what might have been earned by the defendant by the use of the machinery in their factory during the time lost, with the engine and boilers in operation, and what might have been so earned without them, but were limited to the ordinary rent, or hire during that time, which could have been obtained for the use of the machinery whose operation was suspended for want of the steam engine.

Such damages only may be recovered as may be fairly supposed to have entered into the contemplation of the parties; such as might naturally be expected to flow from a violation of the contract: and such as are certain both in their nature and in respect to the cause from which they proceed.

(Argued May 18th; decided May 23d, 1871.)

APPEAL from the judgment of the General Term of the Supreme Court, in the first judicial district, affirming the judgment of the Special Term, rendered upon the report of a referee, in favor of the plaintiff.

Action upon two promissory notes given by the defendant to the plaintiff, and for goods sold and delivered. The action was tried by a referee. The claim for goods sold was small in amount, and was not contested. The notes were given in part payment for a steam engine and boilers, sold by the plaintiff to the defendants.

By the contract of sale, the plaintiff agreed to sell and deliver to the defendants, a steam engine of specified dimensions with the machinery, etc., and boilers.

No time was specified for the delivery of the property. The plaintiff agreed that the engine and boilers should be of the best materials, and should be subject to the approval of the defendants' engineer, and guaranteed that they should be in perfect running order.

The notes, in suit, were given before the engine and boilers had been tested by the defendants or approved by their engineer, in part payment of the agreed price. There was no complaint of the engine. The boilers were not of the material called for by the agreement, and by reason of the defective character of the material, some of the flues collapsed

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upon the first attempt of the defendants to put them to use. This is sufficiently proved and substantially found by the referee. The plaintiff subsequently, at his own expense, put the boilers in good condition, and they were approved by the defendants' engineer, and retained by the defendants. They claim to recoup the damages sustained by reason of the defect in the boilers, as they were first delivered. They gave no evidence of the value of the use or hire of the machinery which stood still during the time the boilers were being repaired, but gave evidence to show how much more and how much better cloth they could have made during the time, if they had had the use of the boilers. The referee found that the plaintiff was not liable to the defendants for these latter damages; and judgment was given upon his report, for the plaintiff, for the amount of the notes and interest, less a small amount allowed to the defendant by way of set-off, which judgment was affirmed by the Supreme Court at General Term, and the defendants have appealed to this court. The other facts are stated in the opinion.

*Wm. Allen Butler*, for the appellant. On the question of the engineer's approval of boiler, etc., *Thomas v. Fleury* (26 N. Y., 26). On the question of waiver, *Barber v. Rose* (5 Hill, 76, and cases cited; *Munro v. Butt* (8 Ellis & Bl., 738); *Smeed v. Ford* (1 El. & El., 602). On the question of recoupment, cases cited, *supra*; *Messmore v. N. Y. S. and L. Co.* (40 N. Y., 422); *Griffin v. Colver* (16 N. Y., 490).

*Samuel Hand*, for the respondent. Facts will not be reviewed. (*Cohell v. Lawrence*, 38 N. Y., 71; *Metcalf v. Mattison*, 32 N. Y., 464; 31 N. Y., 547.) No special damage could be shown. (*Griffin v. Colver*, 16 N. Y., 489; *Freeman v. Clute*, 3 Barb., 424.) On the rule of damages in the case, *Latin v. Davis* (Hill & Denio, 9); *Voorhies v. Earl* (2 Hill, 288); *Cary v. Greenman* (4 Hill, 625); *Brown's Water Furnace Co. v. French* (34 How., 94.) Any claim for damages must be upon the warranty. (*Blanchard v.*

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*Ely*, 21 Wend., 342; *Hadley v. Bazendale*, 9 Eng. L. & Eq.; *Griffin v. Colver*, 16 N. Y., 489; *Thompson v. Shattuck*, 2 Met., 615; *Darwin v. Potter*, 5 Denio, 306; *Lutin v. Davis*, Hill & Denio, 9.) On the question of waiver, *Woodruff v. Peterson* (51 Barb., 252); *Leavenworth v. Pocker* (52 Barb., 132); *Bristol v. Tracy* (21 Barb., 236); *Illion Bk. v. Carner* (31 Barb., 236); *Smith v. Brady* (17 N. Y., 187); *Reed v. Randall* (29 N. Y., 358).

ALLEN, J. The defendants were manufacturers of woolen cloths in the State of Connecticut; employing in propelling their machinery and the other processes of their manufacture, both water and steam power, and the engines, boilers and other machinery, were purchased of the plaintiff to be used in their manufactory in addition to and in connection with other motive powers and other machinery. The contract and agreement of the plaintiff had no reference to the use of the engine and machinery sold for any special purpose, or for use in any particular place. By the plaintiff's contract he was to furnish boilers "of the best materials," and the engine and machinery, with the boilers, were to be "in perfect running order." The referee should, upon the evidence, have found affirmatively and directly that the boilers, upon their delivery, did not conform to the contract, and were not of the best materials; but were of inferior materials, and substantially defective. He has found facts from which this can be spelled out: That they were "of the best material in common use for such purposes;" that a part of the flues "was made of iron not entirely new, but which had been in use elsewhere for about six months;" but that such fact made very little, if any, difference in the quality or value of the article, and none at all in its strength. These facts thus cautiously found, in connection with the fact also found, that upon the first attempt to use the engine one of the boiler flues collapsed by the pressure of the steam, the fact being that the pressure was very slight, justify the conclusion that the boilers were defective, and of inferior and

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unsuitable materials, and that the defendants were under no obligation to accept and pay for the property under the contract. Had they rejected the engine, boilers and machinery upon the evidence and the facts found, no recovery could have been had by the plaintiff for the purchase-price. But with the assent of the defendants, the plaintiff, immediately after notice of the failure of the boilers, put them in proper condition, replacing the flues by others made of proper materials, and the same were accepted and put in use by the defendants. The defendants cannot, therefore, object to the payment of the agreed price. (*Vanderbilt v. Eagle Iron Works*, 25 W. R., 665.) But by such acceptance of the reconstructed boilers the defendants did not waive their right to damages sustained by reason of the original defects, and in this action they may recoupe all damages necessarily and legitimately resulting from the inferior character of the materials or defective construction of the boilers. (*Barber v. Rose*, 5 Hill, 76.) Had they claimed the cost and expense of taking down the boilers after the injury and resetting them after they were repaired, they would have been entitled to it. That was a direct loss, legitimately and necessarily resulting from the defects in the boilers and the violation of the plaintiff's contract. The defendants proved the cost of taking down and putting up the arch and brick work on which the boilers were placed, but made no request to the referee to deduct the amount from the plaintiff's claim, and there is no exception to the omission of the referee to make allowance for this expenditure. The mill and machinery of the defendants did not entirely cease, but their operations were continued during the time the engine purchased of the plaintiff was disabled and incapable of use for the want of the boilers, and the referee has found that "by reason of the loss of the aid and service of said engine and boilers, occasioned by the collapse of said flue, the work of said mill was retarded, the amount of cloth manufactured for the time was less, and that which was manufactured of less value than otherwise it would have been, and the claim for damages

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urged upon the trial was based upon the facts thus found, together with proof of the quantity of cloth actually manufactured, its diminished value per yard for the want of the power this engine would have furnished, and the capacity of the mill with the engine and machinery thus disabled and ruined for the time. The exception is to the finding of the referee, that the plaintiff is not liable for damages arising from the loss of the use of the engine and boilers, and other machines for the time, and because he did not find the reverse of this proposition, and give the defendants the damages claimed. The claim of the defendants was to recover the increased earnings of their manufactory, that which they might have earned with the aid of this machinery over and above that which they actually earned without it. This, within well settled principles, was not the measure of damages; they are quite too contingent and partake of the character of unearned profits. They depend upon circumstances entirely independent of the contract, and the particular thing, the object of the contract, upon contingencies connected with and affecting the general business of the parties rather than the use and the value of the use of the engine and machinery for the time.

In *Blanchard v. Ely* (21 W. R., 342), the defendants were not allowed to recover for the loss of trips of a steamboat, built by contract, and resulting profits, occasioned by defects in the boat or its machinery; and the principle upon which damages are allowed, and the rules by which they are measured, are well considered in an elaborate opinion by COWEN, J. *Griffin v. Colver* (16 N. Y., 489) affirms the same principle, although the learned judge pronouncing the judgment comments on the reasoning of Judge COWEN. That was an action for the contract price of a steam engine agreed to be delivered at a specified time, and the contract was not performed as to time. The claim of the defendant was to recover as damages for the delay, what the proof showed they might have earned by the use of such engine, together with their other machinery during the time lost. This court

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held, affirming the judgment of the Supreme Court, that the defendants were entitled to the ordinary cost or sum which could have been obtained for the use of the machinery, whose operation was suspended for want of the steam engine, and not what might have been earned by its use. The rule is declared to be, that the damages must be such as may be fairly supposed to have entered into the contemplation of the parties; such as might naturally be expected to flow from violation of the contract; such as are certain both in their nature and in respect to the cause from which they proceed. In the case last cited, *Freeman v. Clute* (3 Barb., 424), was approved, holding that upon a contract to furnish a steam engine and boiler by a day named, the purchaser, upon a failure to deliver at the day, was entitled to damages for the "loss of the use of his mill and other machinery;" but that they were not to be estimated by ascertaining the amount of business which could have been done by the use of the engine and the profits that would have accrued. The same rule of damages is applied in analogous cases. The value of the rent or use of the premises of which a tenant was deprived in consequence of the omission of the landlord to repair, was regarded as the proper measure of damages for a breach of the covenant to repair, and not what the tenant could have earned from them, in *Myers v. Burns* (35 N. Y., 269). *Messmore v. New York Shot and Lead Co.* (40 N. Y., 422), was a contract for the sale of certain articles to enable the purchaser to fulfill a contract which he had made for the delivery of the same articles, and the one contract was made in express reference to the other, and was in the contemplation of the parties at the time. There the defendant was held to respond to the plaintiff for all that he had lost by reason of his inability to perform the contract he had made, caused by the breach of the defendant's contract; that is, he was allowed to recover the difference between the price he was to have paid the defendant, and that he would have received. That case was governed by principles not applicable to this.



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There was no evidence given or data furnished by which the referee could have determined the difference in rental value, the value of the use of the defendant's mill and machinery, with or without the steam engine and boilers, purchased of the plaintiff, for the time during which they were deprived of their use in consequence of the defective construction of the boilers. Had there been such evidence, the ruling of the referee that the plaintiff was not liable to defendants for damages for the loss of the use of the engine, boilers and other machinery, would have been erroneous. But the ruling and decision was based upon the evidence, and the claim as made, and was in conformity to the decision of the courts of this State, and well settled rules as to the measure of damages in like cases.

The judgment should be affirmed.

All the judges concurring, judgment affirmed.

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GEORGE CHAMBERLAIN, Appellant, v. JOHN PARKER,  
Respondent.

The plaintiff leased, to the defendant, certain premises, naming no term and reserving no rent. In the same instrument, the defendant covenanted to sink an oil well, on the premises, of a certain depth and by a fixed day. There was a provision for re-entry on breach of the covenant. The defendant having failed to sink the well,—*Held*, that nominal damages only were recoverable by the plaintiff in an action for this breach, and not the cost of sinking such well on the land.

An instrument in writing conveyed to the defendant all the interest of A., in certain premises, with a right of entry on breach of condition subsequent.—*Held*, that the defendant, by accepting the conveyance, became bound to perform the stipulations on his part recited therein, although he had not executed it. The right of re-entry being attached to the covenants, gave them the force of conditions.

Loss may be sustained, in a legal sense, by the breach of a contract, notwithstanding it can be shown that performance would have been a positive injury to the plaintiff, as in case of a failure to perform an agreement to erect a useless structure upon the plaintiff's own premises; but this

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rule does not extend to the erection of a structure upon land in which the plaintiff has no interest, and as to which he is under no obligation.

(Argued May 19th; decided May 30th, 1871.)

APPEAL from an order of the General Term of the Supreme Court, in the eighth judicial district, reversing the judgment entered on the verdict of a jury in favor of the plaintiff for \$2,700, and granting a new trial.

This was an action brought to recover damages for the breach of covenant to put down an oil well. On the 17th of February, 1865, Chamberlain & Knox leased to the defendant, all of their right, title and interest and claim on lot twenty-six, Cornplanter Run, Venango county, Pennsylvania. The lease was signed by both parties, and contained the following clause:

"It is further expressly understood, that the party of the second part (defendant), is to put down a well to the depth of six hundred feet, by the 1st day of July next, unless detained by unavoidable accident, and to pay three dollars a cord for the wood standing on the lot."

No rent was reserved and no term of demise stated.

Chamberlain & Knox assigned all their interest in the lease and land before suit. Upon a failure of the lessee to perform, a right of re-entry was reserved to the lessors. The defendant did not sink the well, and this action was brought to recover damages for the breach. The lessee did not seal the instrument. The jury under the direction of the court, found a verdict for what it would cost to bore such a well, \$2,700.

*D. H. Bolles*, for the appellant. The instrument did not require a seal. (2 Parsons on Con., 721; *Haight v. Sahler*, 30 Barb., 218; *Worrall v. Munn*, 1 Seld., 229.) On the question of damages. (Sedgwick on Dam., 28, 30, 200, 229; *Rawlings v. Morgan*, 34 L. J. (C. P. N. S.), 564; 18 Com. Bench., N. S., 776; 11 Jur. N. S., 564; 12 L. T. N. S., 348; *Diggs v. Dwight*, 17 Wend., 71; *Laraway v. Perkins*, 10 N. Y., 371.)

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*Angel and Finch*, for the respondent, cited *Bogart v. Burkhalter* (2 Barb., 525); *Walker v. Smith* (1 Wash. Circuit Ct., 152); 2 Green. Ev., 32, 53; Sedgwick on Dam., 46.

ANDREWS, J. The instrument of February 17, 1865, called a lease, conveyed to the defendant all the interest of Chamberlain & King in the premises described therein, and left in them no reversion but a right of entry merely, on breach of condition subsequent.

The defendant, by accepting the conveyance, became bound to perform the stipulation on his part recited therein, although he had not signed it, and the right of re-entry being attached to the covenants, gave them the force of conditions. (Co. Litt., 217, *n.*; *Ransom's Admr. v. Copland*, 2 Sand. Ch., 250; *Jackson v. McClellan*, 8 Cow., 395.)

The instrument was signed and sealed by the grantors, and the omission of the defendant to execute it under seal was of no importance.

It is not denied that the defendant wholly failed to perform his agreement to sink a well on the demised premises, and he became by such default liable to an action for a breach of the agreement.

The only question in the case respecting the measure of damages was the amount which the plaintiff, as assignee of the grantor, was entitled to recover.

The learned judge, before whom the case was tried, held that the measure of damages was the amount it would cost to sink a well on the premises to the stipulated depth, and the verdict was in accordance with the rule adopted by the court.

It is the general rule that in actions for a breach of a covenant or contract, the plaintiff is entitled to recover what he has lost by the default of the defendant.

The law seeks to give compensation and indemnity, and nothing beyond it.

If there are some exceptions to this rule, it is not now material to notice them. (Sedgwick on Damages, 204.)

The measure of damages is to be sought in the contract made by the parties, and where the amount of compensation is not fixed by the contract, then the natural, approximate injury occasioned by the breach of duty is, within the contemplation of the parties, the measure of compensation.

Where compensation is to be made to the plaintiff by delivery of an article of value, the value of the article is the loss sustained by the plaintiff, if the contract is broken.

So where a defendant for a compensation paid should agree to build a house for the plaintiff, the value of the house would measure the damages, if the defendant omitted to perform the contract.

In these and like cases, it is easily seen that actual pecuniary loss has been sustained in consequence of the default of the defendant.

But there may be loss, in a legal sense, sustained by the plaintiff from the breach of a contract by the other party, although it could be seen that performance would have not benefited, but might have injured him. If the owner of land employs and pays another to perform a certain act upon it, or to erect a certain structure, it would be no defence to an action by the employer for a breach of the contract to show that the act to be done or the erection to be made, would injure the land or impair its value.

The owner would be entitled to recover the value of the work and labor which the defendant was to perform, although the thing to be produced had no marketable value.

A man may do what he will with his own, having due regard to the right of others, and if he chooses to erect a monument to his caprice or folly on his premises, and employs and pays another to do it, it does not lie with a defendant who has been so employed and paid for building it, to say that his own performance would not be beneficial to the plaintiff.

It is upon this general view of the subject, that the ruling of the court on the trial is sought to be maintained. The point to be considered is, whether the plaintiff in any sense, actual or legal, has lost by the default of the defendant a

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sum equal to the expense of digging the well. The lot embraced in the lease, is located in the oil producing district of Pennsylvania, and the references in it show that the object of the lessee in taking it, was to develop the production of the oil which might be found thereon.

The contract on his part to dig the well, so far as appears in the case, if performed, could result in no benefit to the lessor, except in the possible contingency, that after the well was dug, the default of the defendant in paying for the standing timber on the premises according to his undertaking in the lease, might enable them to re-enter on the premises.

The whole production of the well, if oil should be found, would belong to the defendant for all time, unless the possible ground of forfeiture should occur, just suggested. If this contingency happened, it might be delayed until the supply of oil in the well was exhausted, and the possession of the well had become of no value. The loss or gain in sinking a well was wholly the defendant's. It may be conjectured that the lessor had in view some advantage to other property in the vicinity, from the prosecution of the work of exploration by the defendant. There are no facts shown authorizing this inference, and such a ground of damages, if averred, would be speculative and conjectural, and could furnish no satisfactory basis for a recovery.

The defendant was not paid for digging a well for the plaintiff on his premises. The well, when dug, would be upon the land of the defendant, and its product would be his.

It is idle to say, and the law does not require it to be said, in face of the obvious truth, that the lessors have been damaged to the extent of the cost of digging the well, by the defendant's default. Nor does the defendant gain any undue advantage. The lessor had the right to re-enter, upon the default of the defendant, and he was bound to pay for the wood according to the contract.

It is not probable that any authority can be found precisely in point; but the rule which has been held by the English courts in several cases, to the effect that in an action of cove-

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nant by lessor against lessee for non-repair of the demised premises, under an unexpired lease, the proper measure of damages is not the amount required to put the premises in repair, but the amount in which the reversion is injured by the premises being out of repair, tends to support the conclusion that the rule of damages adopted in this case was erroneous. (*Doe v. Rowland*, 9 C. & P., 734; *Smith v. Post*, 9 Exch., 161; *Turner v. Lamb*, 14 M. & W., 412; *Payne v. Champion*, 16 id., 541.)

The plaintiff was, upon the proof given, entitled to nominal damages only.

The order of the General Term should be affirmed, and judgment absolute must go for the defendant.

All the judges concurring, judgment accordingly.

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COLTON J. REED, Respondent, v. THE NEW YORK CENTRAL RAILROAD COMPANY, Appellant.

In an action to recover for personal injuries caused by the defendant's car, in which the plaintiff was a passenger, leaving the track, alleged to have occurred on account of the defective condition of such track,—*Held* (Chief Judge and PECKHAM, J., *contra*), that the admission of evidence, on behalf of the plaintiff, of the condition of the road at a point half a mile distant from the place of the accident, and evidence that new ties were subsequently put in at points in the neighborhood of the accident, was erroneous.

In such an action, where the injuries are claimed to have resulted in a permanent disability of the plaintiff to perform mental or physical labor, the defendants proved that, several months after the injury, the plaintiff had performed such labor. The evidence of the plaintiff in his own behalf that, at the time this labor was being performed, he declared to a person casually present, and with whom he had no business relation, that he then felt ill, was inadmissible, either to controvert the defendant's proof or to show statements of his own out of court consistent with his testimony. (ALLEN, J.)

*It seems* that since parties have been made by the statute competent witnesses in their own behalf, there is no longer the necessity for giving the declarations of living parties in evidence; which was formerly the reason of the rule admitting them in certain cases; and the reason of the rule

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ceasing, the rule itself, adopted with reluctance and followed cautiously, should cease. (ALLEN, J.)

(Argued May 17th; decided May 23d, 1871.)

APPEAL from the judgment of the General Term of the Supreme Court, in the fifth judicial district, affirming the judgment of the Onondaga circuit, in favor of the plaintiff, for \$4,000.

The action was for injuries received by the plaintiff while a passenger over the defendant's road, alleged to have been caused by the negligence of the defendant. The car on which the plaintiff was riding was thrown from the track, between Rome and Oneida, by some displacement of the rail, and the plaintiff injured. Whether the rail was displaced by the expansion of the iron, the effect of unusual heat, or by defective ties, was among the questions controverted upon the trial, the plaintiff claiming that the ties had become rotten or defective and the defendant claiming that the road bed and ties were in good order, and the rails expanded by the heat, and each gave evidence tending to support their respective claims, and that the accident was the result of the causes alleged by them respectively.

The plaintiff claimed to have received a spinal injury, serious in its character, partially disabling him from labor, from which he had not recovered, and which was likely to be permanent. The extent of the injury was controverted by the defendant, and the evidence was conflicting upon this point.

The plaintiff was a witness upon the trial, and gave evidence of the character of the injuries to his person and of his inability to labor or endure fatigue, and that any mental or bodily exercise caused fatigue, pain and faintness. The defendant proved that several months after the injury, and after the commencement of the action, the plaintiff did perform labor requiring strength of body, and such as one with a diseased or injured spine would not be able to perform. The plaintiff was allowed, in answer to and in explanation of this evidence, and to counteract its effect, to prove his own decla-

rations to a third person at or about the same time, as to the state of his health.

The plaintiff was also allowed, in corroboration of his theory as to the defective condition of the ties and superstructure of the road at the place of the accident, to prove the condition of the road at a point half a mile distant, and that the defendant put in new ties at other places on the road, in that vicinity, after the accident. The jury gave a verdict for the plaintiff, and the exceptions taken at the trial were ordered to be heard in the first instance at the General Term. The Supreme Court at the General Term overruled the exceptions and ordered judgment upon the verdict. From that judgment the defendant has appealed to this court.

*D. Pratt*, for the appellant. On the question of the plaintiff's declarations to a third party, *Wesley v. Person* (28 N. Y., 344); *Baker v. Griffin* (10 Bos., 140); *Caldwell v. Murphy* (11 N. Y., 416); *Thompson and wife v. Freeman Skinner* (8 Watts, 857).

*G. N. Kennedy*, for the respondent.

ALLEN, J. The plaintiff received the injury complained of in June, 1865. The claim was that the spinal column was affected, and that the plaintiff was disabled in a great degree from labor or bodily exercise. As a witness, he testified that he had not, at the time of the trial, September, 1866, recovered from the effect of the injuries; that he had not been able to labor except for a short time, or to do any effective labor; that riding in the cars affected him, causing pain in the back, as also did sitting in a chair at the trial; that mental labor produced similar effects, and that labor for a short time exhausted him and caused severe pain. The defendant proved by other witnesses that in the fall and winter after the injury the plaintiff did perform certain labor requiring health and strength of body, such as able-bodied men usually perform, and the evidence tended to prove that at the time



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referred to, he was in perfect health, and that his strength was unimpaired. Under objection and exception by the defendant, the plaintiff was allowed to prove that, at the same time, he complained to a person whom he casually met, or who was casually present, of not feeling well. The physical condition of the plaintiff up to the time of the trial was a material inquiry, as it bore directly upon the question of damages and the amount of the recovery, and whether in the fall and winter following the injury the plaintiff was in the enjoyment of full health and strength of body, was a material fact in issue. The plaintiff was permitted to prove his own declaration to the fact that at that time his health and strength were impaired. The evidence was permitted to go to the jury as competent evidence, and we cannot say that it did not influence the result. It could be influential in one of two ways: either as proving, or tending to prove, the fact as alleged, or as corroborating the testimony of the plaintiff, by showing that his declarations out of court were consistent with his statements on the witnesses' stand, and it may have had its effect with the jury in both ways. It is not competent in corroboration of a witness or confirmation of his evidence, to prove that on other occasions he has made statements consistent with his testimony. (*Robb v. Hackley*, 23 W. R., 50.) If there are exceptions to the rule, they are very limited in number and special in their character, and this case does not fall within them. They are referred to by BRONSON, J., in the case cited. It is suggested that as a part of the *res gestæ*, the declarations were admissible for what they were worth. They were nearly, and possibly quite simultaneous with the acts proved by the defendant, but they were not made in reference to these acts or in explanation of them, and did not tend to qualify them or detract from their force as evidence. They were made to a person casually present or meeting the plaintiff. The party to whom the declarations were made had no business relation with the plaintiff connected with the acts proved, and coincidence in point of time

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is the only connection between the declarations and those acts. They were in no sense a part of the *res gestæ*.

Declarations are sometimes admissible in evidence as part of the transaction, when they qualify or give character to it. These declarations did neither. The fact of ill health and impaired bodily strength was the material fact, and that could not be proved by the unsworn statement of the plaintiff. Hearsay evidence, as a rule, is excluded, and the declarations and statements of the parties, or of third persons, are not received except under peculiar circumstances, and as a necessity. Statements made out of court, and without the sanction of an oath, are dangerous as evidence, and the rights of suitors ought not to be put in peril by them. The instances are few in which declarations and unsworn statements made out of court have been permitted to be given in evidence as proof of the facts sought to be established. Statements and representations of a sick person, of the nature, symptoms and effects of his malady, have been received as original evidence, and especially when made to a medical attendant, to enable him to minister to the patient, they have been regarded as competent evidence, and entitled to weight. (1 Greenl. Ev., § 102.) There is good reason for their admission when made to the attending physician or surgeon, as upon them, in connection with the manifestations and symptoms of injury or disease the opinion of the expert is based and the treatment governed. But in every other case the admission of testimony so exceptional, as a departure from the established rules of evidence must be referred to the necessities of the case, and the inability of the party to give evidence of a higher and more satisfactory nature. The general rule is that the best evidence of which the fact is susceptible must be adduced, and secondary or inferior evidence will not be received, so long as the higher and better evidence can be had. The plaintiff was a competent witness to prove the state of his health at the time he handled the bags of clover seed and performed the other labor mentioned, and it was not necessary to resort to other and inferior evidence;

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and so long as his sworn statements were admissible, his unsworn declarations should not have been received. *Aveson v. Lord Kennaird* (6 East, 188) was an action upon a policy of insurance upon the life of the plaintiff's wife, and the declaration of the wife made soon after the making of the policy, when lying in bed apparently ill, stating the condition of her health at the period of her going to Manchester for examination by a surgeon, preparatory to the insurance, was held admissible because the fact was material, and that was "the best evidence which the nature of the case afforded;" and in addition to this, the plaintiff having proved the declarations of the wife to the examining surgeon, the subsequent statements by her were regarded as in the nature of a cross-examination by the plaintiff's own witness, within the principle of *Wright v. Littler* (8 Burr., 1255), where the statements of a deceased subscribing witness to a bond were allowed to be given in evidence to impeach the bond. From the necessity of the case, the statements of parties who could not be examined as witnesses in their own behalf as to bodily suffering and pain and personal injuries, when made soon after an alleged injury, or made while apparently ill to a physician or nurse, or other person, have been received in evidence and permitted to go to the jury for what they were worth. *Goodwin v. Harrison* (1 Root, 80) is an early case, and there in an action by a young lady for a bodily injury, she was allowed to prove the complaints made to her mother the morning after the injury. The court placed the admission upon the ground of necessity, there being no other method of proving the facts. The same rule of evidence was approved, and for the same reason, in *Caldwell v. Murphy* (1 Ker., 416), and in *Wesley v. Persons* (28 N. Y., 344); and see 1 Phil. Ev., by C. & H., 232. But by the amendment of the Code in 1869 (§ 398), there is no longer a necessity for giving in evidence the declarations of a party, if he is living and able to be sworn and examined as a witness, and the reason of the rule ceasing, the rule itself, adopted with reluctance and followed doubtfully and cautiously, should cease. The admission of this

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Statement of case.

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evidence was erroneous, and entitles the defendant to a new trial. There was other evidence admitted that should have been excluded, if it was covered by the objection of the defendant. The fact that new ties were put on the road after the accident, and especially the next summer, in the vicinity, did not tend to prove that the road was out of repair and dangerous, at the time of the injury to the plaintiff. If the evidence tended, legitimately, to prove the imperfect and dangerous condition of the defendants' road, and was competent, the defendants should have been permitted to explain the act by their superintendent, and show that it did not necessarily prove, or tend to prove that the road was in an unsafe condition; that the taking out of old ties and substituting new, was a continual process for the preservation and keeping up the road, and prevent its becoming imperfect and out of repair, a preventive and precautionary rather than a restorative measure.

The judgment must be reversed and a new trial granted, costs to abide the event.

GROVER, J., concurred in the opinion; FOLGER, J., concurs in the result, on ground of error in the admission of evidence, as to the condition of the road at a distance from the accident, and to the laying of new ties along the road subsequently; RAPALLO, J., concurred in the result on the same ground. He agreed also with the opinion as to the other question discussed; Chief Judge and PECKHAM, J., dissent; ANDREWS, J., did not vote.

Judgment reversed and new trial granted.

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| 114 | 135 |

JAMES McHENRY, Appellant, v. ROWLAND G. HAZARD et al.,  
Respondents.

A court of equity has power to compel the surrender and cancellation of written instruments, obtained by fraud, or held for inequitable and unconscientious purposes. The exercise of this jurisdiction is in the sound

## Statement of case.

discretion of the court, depending upon the special circumstances of each case; and it is not material, upon the question of jurisdiction, that the party seeking the relief has a defence at law to the instrument of which he prays the surrender and cancellation.

Where a defendant *may* obtain the equitable relief to which he is entitled, in an action brought *against* him, he can, nevertheless, during the pendency of such suit, bring an action in his own behalf to accomplish the same result.

An obligation was obtained from the plaintiff by fraudulent representations. A and B both claimed to own it by assignment. Each commenced an action against him, and claimed in hostility to each other.—*Held*, that he might, during the pendency of the actions against him, bring a separate suit against both claimants, to be relieved from the contract, on the ground of fraud therein, and was entitled to the decree of the court against them ordering its surrender and cancellation, upon establishing the fraud.

(Argued April 12th; decided May 23d, 1871.)

APPEAL from the judgment of the General Term of the Supreme Court of the first judicial district, affirming a judgment of the Special Term sustaining a demurrer to the complaint.

Hallett wrote a letter to McHenry, both then being in England, upon which letter McHenry wrote an indorsement and returned the letter to Hallett. The letter and indorsement are as follows:

*“September 9th, 1858.*

“JAMES McHENRY, Esq.:

“DEAR SIR.—Now that the negotiation of the bonds of the Atlantic and Great Western R. R. is completed, and the contract for the rails concluded, and my right to receive my commissions recognized, you, as my attorney and trustee, are hereby authorized to pay John Thompson, Esq., of Rhode Island, £30,000 sterling, in the first mortgage seven per cent bonds of this company, at seventy-five per cent, at the date that you receive my commissions; and payments made by virtue of this order you will charge in account with me.

“I am, dear sir, faithfully yours,

“SAMUEL HALLETT.”

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Statement of case.

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"To SAMUEL HALLETT, Esq.

"I engage to hold at the disposal of John Thompson £30,000, as herein mentioned by you, in same proportions as received by me, of which I shall render one-half in twelve months, and again in twenty-four months after date.

"September 15<sup>th</sup>, 1858.

"JAMES McHENRY."

McHenry being on a temporary visit to this country in the summer of 1864, three actions were commenced against him; all founded upon this instrument, and the liability supposed to have been created thereby; one by Rodman, and two by Hazard; each claiming to recover judgment in his own right, as assignees of Thompson. In the first suit of Rodman, an attachment was issued for \$270,000 to discharge which the defendant gave a bond for \$540,000. In the suit of Hazard, an attachment was issued and levied for \$300,000. In the second suit of Rodman, no complaint had been served, the time for that purpose having been from time to time extended. Before the commencement of this action, an application was made at Special Term, under section 122 of the Code, for an order requiring the plaintiff, in each of the said actions, to make the defendant, in the other action, a party defendant, with proper allegations to bar and foreclose his right. (This application was successfully opposed by the same attorneys now representing both defendants in the present case, on the ground that this plaintiff's remedy was to be found in an independent action against Hazard and Rodman for equitable relief, and not under that section of the Code.) This action having been brought to obtain such relief, a demurrer was interposed to the complaint; the demurrer was sustained at Special and General Terms, and the plaintiff appeals here. The complaint in this action, as a part thereof, contains the complaints and answers thereto in the several actions of Rodman and Hazard, the defendants. It, substantially, alleges that the instrument or obligation was obtained by fraud and false pretenses, and should be

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Opinion of the Court, per ANDREWS, J.

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delivered up to be canceled. That the instrument was without consideration, and therefore void. The allegations of all the pleadings are stated sufficiently in detail in the opinion.

*W. W. McFarland*, for the appellants. A cross-suit must be brought, and the necessary parties brought in. (*Auburn City Bank v. Leonard*, 20 How., 357.) On the question of fraud and failure of consideration. (Story's Eq., §§ 693, 694; *Hamilton College v. Cummings*, 1 John. Ch., 517; 17 N. Y., 599; *Lloyd v. Clark*, 6 Bev., 309; *French v. Connolly*, 2 Aust., 454; *Withingham v. Thornburg*, 2 Vern., 206; *De Costa v. Scandrel*, 2 P. Wms., 170.) On the question of joining the actions. (Story's Eq., §§ 852, 854, 901, and notes; *Hove v. Tenants of Broomsgrove*, 1 Vern., 22; *Mayor of N. Y. v. Pilkington*, 1 At., 282; *Carroll v. Stafford*, 3 How. U. S., 463; 17 N. Y., 592.)

*Joseph H. Choate*, for the respondents, cited *M. and H. R. R. Co. v. Clute* (4 Paige, 262); *Foot v. Sprague* (12 How., 355); *Hunt v. Farmer's Trust Co.* (8 How., 418); *Burgett v. Bissell* (5 How., 192); *Hinman v. Judson* (13 Barb., 629); *Oxford City Bank v. Leonard* (20 How., 193); *Dobson v. Pearce* (12 N. Y., 159); *Orary v. Goodman* (12 N. Y., 276); *Mirfield v. Bacon* (24 Barb., 154); *Bartlett v. Judd* (23 Barb., 262).

ANDREWS, J. The power of a court of equity to compel the surrender and cancellation of deeds and other written instruments, obtained by fraud or held for inequitable and unconscientious purposes, is undoubted. The jurisdiction is an ancient one, and is grounded upon the inherent power of the court to take cognizance of frauds, and to administer the peculiar remedies which belong to a court of equity in preventing and suppressing them.

While this jurisdiction has been more frequently invoked in respect to negotiable instruments and instruments purporting to give an interest in real estate, or creating a cloud upon

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Opinion of the Court, per ANDREWS, J.

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the title of the rightful owner, it has not been confined to cases of this description.

. It has been frequently exercised by compelling the surrender and cancellation of bonds, policies of insurance, and contracts not negotiable, obtained by fraud, or under which a hostile and unjust claim was or might be asserted. (*Whittingham v. Thornburgh*, 2 Vern., 206; *De Costa v. Scandrel*, 2 P. Wms., 170; *Hamilton v. Cummings*, 1 Jo. Ch., 517.)

It has been exercised to compel the cancellation of forged instruments (*Peake v. Highfield*, 1 Russ., 559); of a false token, purporting to show an interest in the stock of a corporation (*The N. Y. and N. H. R. R. Co. v. Schuyler et al.*, 17 N. Y., 559), and in a great variety of cases, which it is now unnecessary to further enumerate.

The exercise of this jurisdiction is in the sound discretion of the court, depending upon the existence in each case of these special circumstances, which the course of practice and decision requires, to warrant the interposition of the court. (Story Eq. Jur., 693.)

In *Hamilton v. Cummings* (*supra*), the chancellor, in a carefully considered judgment, states as his conclusion from the authorities, that a resort to equity to compel the cancellation of written obligations, to be sustained, "must be expedient, either because the instrument is liable to abuse from its negotiable nature, or because the defence arising on its face may be difficult or uncertain at law, or from some other special circumstances peculiar to the case, and rendering a resort to a court of equity highly proper and clear of all suspicion of any design to promote expense and litigation."

Lord ELDON, in *Bromley v. Holland* (Coop, 9), speaking of this jurisdiction, says: "There is an ancient jurisdiction in this court to order bills, policies of insurance, and annuity deeds, to be delivered up, and it is a wholesome jurisdiction, to order void instruments to be delivered up, upon which vexatious demands might afterward be set up." (See also Story's Eq. Jur., § 700.)



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Opinion of the Court, per ANDREWS, J.

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Nor is it material upon the question of jurisdiction that the party seeking the relief has a defence at law to the instrument of which he prays the surrender and cancellation. (*Hamilton v. Cummings, supra*; Story's Eq. Jur., § 700a.)

The defendants admit by their demurrer that the plaintiff was induced to execute the writing of September 15th, 1858, whereby he engaged to hold and account for the bonds of the Atlantic and Great Western Railroad, to an amount and in the manner therein specified by the false and fraudulent representations of Hallett, which are specifically set out in the complaint.

This agreement, construed in connection with the letter of September 9th from Hallett to the plaintiff, to which it refers, seems to import merely an engagement on the part of the plaintiff to execute an agency and authority at the instance of Hallett, in respect to bonds which might thereafter come to his possession belonging to the principal.

It does not appear from the letter or the acceptance indorsed thereon by the plaintiff, that the right of Hallett to the bonds was derived through any contract with the plaintiff, or that the latter was in any respect interested in them.

Upon this letter and acceptance alone, although the plaintiff was induced to sign the acceptance by the fraud of Hallett, there would be little ground for sustaining the action for the cancellation of the instrument.

The fraud of Hallett in procuring the plaintiff to sign the acceptance and agreement of September 15th, would seem to be no answer to a demand that he should account for any securities which he might receive as agent for the principal, according to the terms of his engagement.

It appears, however, by the complaints in the actions brought by these defendants against the plaintiff, that the acceptance of September 15th grew out of an agreement made between Hallett and the plaintiff a short time prior to that date, whereby the plaintiff agreed to divide with Hallett the profits he might realize from a contract made by the plaintiff with one Doolittle, a contractor for building the

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Opinion of the Court, per ANDREWS, J.

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Atlantic and Great Western railroad.. By that contract the plaintiff was to furnish to Doolittle a certain amount of money, and 31,000 tons of iron rail, for which Doolittle was to pay him £400,000 in the bonds and stocks of the corporation, at the times and in the proportions specified in the contract. These allegations in the complaints in the actions of these defendants against the plaintiff are adopted and affirmed by the plaintiff in his complaint in this action, and the plaintiff alleges that he was induced to enter into the agreement with Hallett to divide the profits arising from the contract with Doolittle, and to sign the acceptance of September 15th (which had reference to bonds to which Hallett, upon such division, would be entitled), upon the false and fraudulent representation of Hallett that he had and controlled certain contracts with third persons, by which they were to advance money and furnish rails in exchange for the bonds of the Atlantic and Great Western railroad, which contracts he represented would be available to the plaintiff upon his contract with Doolittle, and which he agreed to assign to the plaintiff. The complaint negatives the existence of the contracts, and the representations of Hallett in respect to them.

/ Upon these facts the plaintiff, within the principles governing courts of equity in decreeing the cancellation of contracts, was entitled to have the agreement of September 15th surrendered and cancelled. It purported to create an obligation which could be enforced against him. /

| It is true that the fraud of Hallett would have been a good defence to an action against the plaintiff, upon the agreement, but the fraud did not appear upon the face of the instrument, and could only be established by extrinsic proof.

The plaintiff, before an action had been commenced against him, could come into court for equitable relief against the fraud, and would not have been compelled to await the commencement of an action upon the contract, and to rely for his protection upon his ability to defend it. The defendants could not, at their election, postpone the litigation of the

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Opinion of the Court, per ANDREWS, J.

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question, and subject the plaintiff to the vexation of a litigation at a distant period, when the means of defence might be lost or impaired, and when he might be disabled from contesting the validity of the claim with the same ability as at the present time.

It is insisted, however, by the counsel for the defendants, that the pendency of the actions brought by them against the plaintiff, founded upon his liability, under the agreement of September 15th, was a bar to the relief sought by him through an independent action, and that his remedy against the fraudulent instrument was to be found in defending the actions brought against him.

It was a prominent motive, in constituting a single court having jurisdiction in law and equity, to remedy the inconvenience, which existed when legal and equitable remedies were administered by separate tribunals, of obliging parties to resort to two courts to determine rights connected with a single transaction. The provisions of the Code allowing causes of action, legal and equitable, growing out of the same transaction, to be united in a single suit, and legal and equitable defences to be interposed in the same answer, and authorizing affirmative relief to be granted to a defendant, were designed to prevent unnecessary litigation, and to enable parties to bring into one suit all the elements of the controversy for the purpose of a complete and final adjudication. And where a defendant may obtain the equitable relief to which he is entitled in the action brought against him, he cannot, during the pendency of such suit, bring an action in his own behalf to accomplish the same result.

It was said by ALLEN, J., in *Dobson v. Pierce* (2 Kern., 156), that "the intent of the legislature is very clear that all controversies respecting the subject-matter should be determined in one action."

But we are of opinion, that this case is not within the rules which we have stated, and that the plaintiff was not precluded by the pendency of the actions against him, from bringing a separate suit for equitable relief against the contract.

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Opinion of the Court, per ANDREWS, J.

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The actions brought by the defendants, severally, against the plaintiff, claimed of him the performance of the same alleged debt or duty based upon the contract of September 15th.

Each of the defendants claimed to own, by assignment, the instrument.

Each asserted the same right against the plaintiff, and claimed, in hostility to each other, the cause of action founded upon it, by title anterior to the commencement of either suit.

The right of the plaintiff to relief, and to the decree of the court for the surrender and cancellation of the contract upon which the actions were brought, was, upon the admitted facts, perfect.

But the judgment of the court, in his favor in one of the actions, would not determine the litigation.

That judgment would not conclude the other defendant from claiming to recover upon his title. He would not be bound as a privy, because his alleged title originated before the commencement of the action in which judgment had been rendered. (*Doe v. Earl of Derby*, 1 Adol. & Ellis, 783; 2 Smith's Ldg. Cases, 686.)

The plaintiff, therefore, unless he could bring his action for the cancellation of the contract against both parties claiming it, would not only be subjected to the expense of a double litigation and the hazard of a double recovery, but must try two actions to secure a single right.

The Code is not, we think, subject to a construction which would lead to such a result. (*Haire v. Baker*, 1 Seld., 357; *Siemon v. Schurck et al.*, 29 N. Y., 598.) The case was not one where a proceeding in the nature of an interpleader could have been taken in the original actions (Code, § 122), as the plaintiff denied any liability to either of the defendants.

The action was well brought, and the demurrer should have been overruled.

All the judges concurring, except FOLGER, J., not voting, judgment reversed.

## Statement of case.

LEWIS S. LEVY, Respondent, v. SYLVESTER BRUSH, Appellant.

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| 45  | 589 |
| 122 | 285 |

A verbal agreement was entered into between the plaintiff and defendant, by which the latter agreed to bid off in his own name, and enter into a contract for the purchase of land, and pay from his own funds the necessary amount for that purpose for the joint benefit of both. The plaintiff was to reimburse one-half of the money so paid; the deed to be taken in the name of both.—*Held*, the defendant having bid off the land in his name and taken a contract thereof, but refused to convey one-half of the contract to the plaintiff, that no action would lie to compel the execution of the agreement.

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| 45  | 589 |
| 157 | 288 |

Such an arrangement did not constitute a partnership between them.

A party in no legal sense commits a fraud by refusing to perform a contract void by its provisions. He has not, in that sense, made a contract, and has a perfect right, both at law and in equity, to refuse performance.

(Argued May 22d ; decided May 30, 1871.)

APPEAL from the judgment of the General Term of the Superior Court of the city of New York, affirming the judgment of the Special Term in favor of plaintiff.

On March 10th, 1868, at the Exchange Sales Rooms, in the city of New York, three lots of land on the south-easterly corner of Fifty-ninth street and Seventh avenue were struck off to the defendant, as the highest bidder ; but it does not appear that the bid was made effectual by the signing of a contract.

On March 18th, the plaintiff commenced this action, alleging that it was agreed at the auction sale, on March 10th, that the plaintiff and defendant should purchase the lots jointly ; that the bid should be taken in the defendant's name, and the deed in their joint names ; and upon the allegation that the defendant refused to recognize the plaintiff's rights in the transaction, the complaint prayed that the conveyance be executed to both parties as tenants in common, and that an injunction issue to restrain the defendant from taking a conveyance in his own name.

An injunction was granted accordingly ; but upon the defendant's denial that he made the alleged agreement, and his admission that he made a similar agreement respecting other lots, the injunction was modified, and he was permitted

## Statement of case.

to take the conveyance. He subsequently took a deed of the lots, and he paid all of the consideration money.

The judge, at Special Term, found as fact that the parties made the verbal agreement set forth in the complaint, and that on March 10th, the parties "effected the purchase of said real estate." He further found as facts (third and fourth findings), "that the plaintiff duly tendered to the defendant the share or *pro rata* which the plaintiff was bound to pay for and on account of said purchase," and "that the defendant refused to accept the said tender."

Thereupon, the court held, as a conclusion of law, that the defendant was seized of an undivided half part of the three lots as trustee for the plaintiff, and accordingly judgment was entered requiring the defendant to execute a conveyance thereof to the plaintiff upon his payment of one-half of all sums paid out, and upon his covenanting to assume one-half of the bond and mortgage given for purchase-money. The other facts are sufficiently stated in the opinion.

*Osborn E. Bright*, for the appellant. The proofs were too indefinite to warrant the decree. (*Lench v. Lench*, 10 Ves., 518; *Pilling v. Armitage*, 12 Ves., 78; *Parkhurst v. Van Cortlandt*, 1 John. Ch., 273; 14 John., 15.) A trust arises by operation of law only upon a conveyance. (*Green v. Drummond*, 31 Md., 71; *Murray v. Rogers*, 3 Paige, 390; *Steere v. Steere*, 5 John. Ch., 1; *Dyer v. Dyer*, 2 Cox, 92; *Jackson ex dem Seeley v. Morse*, 16 John., 197; Comyn's Dig. tit. Uses, D., 1.) The conclusion of law that the defendant is trustee of a part of the land for the plaintiff is erroneous, even in view of the conveyance as the basis of the action. (*Atkins v. Rowe*, Mos., 39; *Bartlett v. Pickersgill*, 1 Eden, 515; *Barret v. Dougherty*, 8 Casey, 371; *Smith v. Burnham*, 3 Sumner, 435; *Lathrop v. Hoyt*, 7 Barb., 63; *Montacute v. Maxwell*, 1 P. Wms., 618; *Brewster v. Power*, 10 Paige, 562; *Leman v. Wittey*, 4 Russ. Ch., 423; *Botsford v. Burr*, 2 Johns. Ch., 405; *Kisler v. Kisler*, 2 Watts, 323; *Jackman v. Kingland*, 4 Watts & S., 149; *Pinnock v. Clough*,

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16 Verm., 501.) A trust did not arise in favor of the plaintiff by operation of law. (*Chesterfield v. Janson*, 2 Ves., Jr., 155; *Lamas v. Bayley*, 2 Vern., 627; *Ryan v. Dox*, 34 N. Y., 307; *Sanford v. Morris*, 1 Trans. App., 350; *Gardner v. Ogden*, 22 N. Y., 327; *Walker v. Walker*, 2 Atk., 99; *Moore v. Moore*, 1 Seld., 256; *Parkist v. Alexander*, 1 John. Ch., 394; *Sweet v. Jacobs*, 6 Paige Ch., 355; *Lees v. Nuttall*, 1 Russ. & Myl., 53; aff'd, 2 Mylne & Keen, 819; *McCulloch v. Cowler*, 5 Watts & S., 430; *Denton v. McKenzie*, 1 Desau., 289; *Brown v. Lynch*, 1 Paige, 147; *Van Horne v. Fonda*, 5 John. Ch., 388; *Swineburne v. Swineburne*, 28 N. Y., 568.) On the question of part performance. (*Adams' Eg.*, 86; *Buckmaster v. Harrop*, 7 Ves., 341; *Seagood v. Meale*, Prec. Ch., 560; *Malins v. Brown*, 4 Comst., 403; 4 Kent's Com., 451.)

*Henry Morrison* and *Siegmund Spingarn*, for respondent. The agreement is not within the statute of frauds. (2 Edm. Statutes, 139.) On the question of partnership. (*Tomlinson v. Miller*, 7 Abb. N. S., 364; *Sage v. Sherman*, 2 N. Y., 417; *Bunnell v. Fowler*, 4 Conn., 568; *Fall River W. Co. v. Borden*, 10 Cushing, 458; *Essex v. Essex*, 20 Beavan, 449; *Foster v. Hall*, 5 Vesey, 309; *Dale v. Hamilton*, 5 Hare., 269; 2 Ph., 266; *Caddick v. Simpson*, 2 De G. & J., 52; *Cloggett v. Kilbourne*, 1 Black., 346; *Matter of Warren, Davies* (Me.), 320.) The statute cannot be invoked for the purpose of imposition. (*Ryan v. Dox*, 34 N. Y., 307; *Sanford v. Morris*, 1 Trans. App., 250; *Mooney v. Herrick*, 18 Penn., 128; *Soggin v. Heard*, 2 Geo., 426.) This was a trust, created by law, and exempt from the operation of the statute. (1 Edmonds' Statutes, 677.)

GROVER, J. The appellant's counsel insists that the case fails to show that any contract in writing for the sale of the lots in question to the defendant, pursuant to his bid, was made and signed by the vendor and delivered to the defendant, so as to give the latter any valid claim to a conveyance

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Opinion of the Court, per GROVER, J.

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of the land, under the statute of frauds, upon the performance of such contract, and that for this reason the plaintiff failed to show any cause of action against the defendant. If the counsel's premises are correct, his conclusion would necessarily be so, as it is clear the plaintiff would have no remedy against the defendant for the breach of the alleged agreement to share the lots purchased equally with him, if no valid contract for such purchase was made. But I do not so understand the case and findings of fact by the judge. From the latter it appears that on the tenth day of March, 1868, at the Exchange sales rooms in the city of New York, the parties to the action entered into and made the verbal agreement set forth in the complaint, for the joint purchase of the real estate and premises described therein, to wit, lots known as numbers eighty-eight, eighty-nine and ninety, laid out upon the map or diagram referred to in the complaint; that subsequently, on the same day, the parties, at the said rooms, in pursuance of the said agreement, effected the purchase of said real estate and premises for the firm, for the sum of \$59,000; that the plaintiff duly tendered to the defendant the share or *pro rata* which the plaintiff was bound to pay for and on account of said joint purchase, to wit, one-half of the auctioneer's charges, and ten per cent of the purchase-money of said premises, according to the terms of the auction sale of said premises, and the plaintiff offered to secure jointly with him the bonds and mortgages, as required by the terms of the auction sale; that the defendant refused to accept the said tender, and refused to permit the plaintiff to participate in the said joint purchase of said premises; that the defendant, under a modification of the injunction order issued in the action upon the complaint, had taken a conveyance of the land in his own name. Upon referring to the complaint in the action to which reference is made in the findings, it further appears that it was a part of the verbal agreement between the parties that the defendant should do the bidding for and on behalf of the parties for the lots in question; that the bid should be taken in his name; that the deed



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Opinion of the Court, per GROVER, J.

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should be taken in the joint names of the parties to the action as tenants in common, and that the bonds and mortgages, pursuant to the terms of sale, should be executed by both parties. The reasonable conclusion to be drawn from these facts, as a whole, is that the parties, being present in the sales-room at a sale by auction of real estate, made a verbal agreement to the effect that the defendant, in his own name, should bid off the land in question, pay the sums to the auctioneer and vendor required by the conditions of the sale, and enter into a written contract for the purchase of the land in pursuance of his bid and the terms of sale, and that the lands should be conveyed to both as tenants in common; that the plaintiff should presently refund to the defendant the one-half of the money paid by him, and that both parties, upon the receipt of the conveyance, should join in the bonds and mortgages required to be given; that the defendant did bid off the lots, pay the money required by the terms of sale, and enter into a valid contract in writing for the purchase of the lots, in accordance with the bid and terms of sale. That such contract was made, appears from the finding that the purchase was effected, as it clearly appears that no conveyance was taken, and, in the absence of both, no purchase, in a legal sense, was effected. That the defendant paid the money required by his bid appears from the fact that the plaintiff tendered one-half of the amount to him instead of paying it to the auctioneer and vendor. That the contract was in the defendant's name, appears from the fact that the action is against him, to enforce the plaintiff's right to an equal share in the lots with him, omitting to make the vendor a party, which would have been done had the contract been in the names of both. Indeed, there is no intimation of the latter fact in the pleadings, testimony or findings of fact. That all that was done by the defendant, down to the refusal of the tender, was in accordance with the verbal agreement, appears from the uncontradicted evidence of the parties that both were present during the transaction, and no suggestion was made by the plaintiff of anything wrong connected with it

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prior to such refusal. The appellant's counsel further insists that, assuming that the bid was consummated by a valid contract for a conveyance, and further assuming that the verbal contract between the parties was valid, an action could not be maintained by the plaintiff against the defendant while the contract remained executory. In this position I cannot concur. The doctrine is well settled in equity that when a valid contract for the sale and conveyance of land is made, the purchaser is regarded as the equitable owner of the land, and therefore equity will enforce the performance of any valid agreement in relation to the contract evidencing such equitable title. This brings us to the real question in the case; that is, whether equity will enforce a verbal agreement between parties, by which one agrees to bid off in his own name and enter into a contract for the purchase of land, pay from his own funds the necessary amount for that purpose for the joint benefit of both, the other presently reimbursing one-half of the money so paid. This is, I think, a fair statement of the case. The only other inference, at all variant therefrom, would be that the agreement of the defendant required him, after bidding off the land, to take the contract for the purchase in the names of both. If this be conceded to be the true construction of the contract, it would not affect the principle governing the case. It is insisted by the counsel for the respondent that the agreement is not within the eighth section of the statute of frauds (2 R. S., 135), for the reason that there was no agreement for the sale by the defendant of an interest in the lots to the plaintiff; that the agreement between the parties was that they should together contract for the purchase of the land for their joint benefit, and that the only sale contemplated was not from one party to the other, but one from the then owner to both parties. But this does not meet the difficulty. If no valid contract for a purchase had been made, the plaintiff would have had no remedy against the defendant, although the failure to make such contract was wholly from the default of the defendant. In other words, an action will not lie by

one party against another for the breach of a verbal agreement to unite with him in the purchase of a designated piece of land, the title to be taken by them in common. No purchase having been made, such an agreement would come within the eighth section, as no party can be charged for the breach of a contract to purchase lands when there has been no contract made for the sale. Had the defendant, after making the agreement with the plaintiff to bid off the lots in his own name, refused to bid at all thereon, in consequence of which the lots were sold to another, the plaintiff would have had no remedy against the defendant. It was not until the defendant, pursuant to the contract, had bid off the land and made a valid contract for the purchase that the plaintiff could have acquired any rights, as the previous agreement was void by the statute. If the plaintiff acquired any interest in the contract for the purchase of the lots made by the defendant, or in the equitable title of the land thereby acquired, it was upon the ground that such contract was obtained pursuant to the agreement of the parties, and that, together with the equitable title, was held by the defendant, under the agreement, for the benefit of both parties. Precisely here the plaintiff encounters the sixth section of the statute, which provides that no estate or interest in lands, other than leases for a term not exceeding one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, etc., unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing. This section precludes the idea that when the defendant secured the contract for the purchase, and the equitable title to the land thereunder, any trust attached thereto in favor of the plaintiff. This view is fully sustained by *Smith v. Burnham* (3 Sumner, 435), where the authorities are elaborately reviewed by Judge Story. (2 Story's Eq., § 1201a; Sug. on Vendors, 911, and cases cited.) The counsel for respondent insists that *Smith v. Burnham*, and the

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Opinion of the Court, per GROVER, J.

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Opinion of the Court, per GROVER, J.

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cases cited by the judge, cannot be regarded as authority upon the point under consideration, for the reason that those cases come under the English statute, and the statutes of States differing from our statute. An examination will show that there is no material difference in respect to trusts sustained by verbal agreements, only a trust in the defendant in favor of the plaintiff cannot be supported upon sections 50 and 53 (1 R. S., 728), for the reason that the latter paid no part of the consideration-money paid upon the contract. It was urged by the counsel that an agreement between partners to purchase and sell lands for their mutual benefit was valid by parol. It is unnecessary to consider this question, as there was no partnership between these parties. The agreement was for the purchase only, the title to be taken in common. It is clear that such an agreement does not constitute a partnership. (*Sage v. Sherman*, 2 Com., 418.) The counsel for the respondent insists that the statute cannot be invoked as a shield to protect a party in the perpetration of a fraud, and cites *Ryan v. Dox* (34 N. Y.), and other cases in support of his position. The position, rightly understood, is correct. This is the basis upon which the doctrine of the specific performance of verbal contracts for the purchase of real estate by courts of equity in cases of part performance rests. Upon this principle, where a party whose lands were about to be sold by judicial sale, has agreed with another to loan him money, and bid off and hold the land as a security for the money, and the agreement has been consummated, the vendor has been held to hold the title so acquired as a mortgagee in equity. Upon these grounds *Ryan v. Dox* was decided. But no case can be found where a contract has been taken out of the statute in favor of a party who had no existing interest in the property, who had done no act of part performance, who had parted with nothing under the contract, simply upon the ground that the other party was guilty of a fraud in refusing to perform his verbal agreement. That is all there is of this case, except the offer of performance by the plaintiff. To hold that to be sufficient, to take the case out of the statute,

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Statement of case.

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would repeal it. Care must be taken that this is not done, under an idea that as the statute was enacted to prevent fraud, it cannot be applied to cases where it appears that, in a moral sense, a party is attempting to perpetrate a fraud. A party, in no legal sense, commits a fraud by refusing to perform a contract void by its provisions. He has not, in that sense, made a contract, and has a perfect right both at law and in equity to refuse performance. But where the party seeking performance has partly performed, or has, as in the case of *Ryan v. Dow*, parted with valuable property upon the faith of the contract, the case is different. In such cases, equity will not permit a party to retain property obtained on the faith of a verbal contract, to consummate a fraud by retaining the property and refusing to perform the contract. The judgment appealed from must be reversed and a new trial ordered, costs to abide the event.

All concurring, judgment reversed.

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JAMES M. SMITH, Respondent, v. JACOB DUCHARDT, Appellant.

Parties engaged in a particular trade, resolved to take measures to test in the courts the validity of a statute affecting their business, and all signed the following paper: "We, the undersigned, hereby agree to pay our share of costs, equally divided, for the purpose of engaging counsel and to bring our cases before the courts."—*Held*, that the instrument gave no authority to any number of the subscribers, less than all of them, to take any action under it, and that the delivery of this paper to the plaintiff, a counselor-at-law, by a portion of the signers, calling themselves a committee, with a request that he act as counsel for all at a fixed rate, gave to the plaintiff no right of action against any of the other signers.

(Argued May 18th; decided May 30th, 1871.)

APPEAL from the judgment of the General Term of the Superior Court of the city of New York, affirming the judgment of the Special Term in favor of the plaintiff, against the defendant, for \$250.

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Opinion of the Court, per ANDREWS, J.

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The plaintiff sued to recover for services rendered as counsel. The following instrument was put in evidence by the plaintiff: "We, the undersigned, hereby agree to pay our share of costs, equally divided, for the purpose of engaging counsel and to bring our cases before the courts, in reference to the action of the board of health in reference to the removal of our legitimate business by the 15th of June, 1867." This instrument was signed by the defendant and fifteen others. The signers were butchers in New York, and desired to have suits brought to test the validity of the Metropolitan health act as to the removal of their places of business. Two or more of the subscribers (Shuster and another), called upon the plaintiff, calling themselves a committee for the others, and requested him to commence actions, which he did. Injunctions were obtained in sixteen suits; \$4,000 was agreed to be paid in case these injunctions were obtained. No evidence was given of the appointment of a committee, with the consent of the defendant. Payment was demanded from defendant and refused.

*David McAdam*, for appellant.

*Samuel Hand*, for the respondent, cited *Barnes v. Perine* (2 Kern., 18); *Ref. Church v. Brown* (17 How., 287); *McAuley v. Bellinger* (20 John., 89); *Richmondville Seminary v. Robinson* (34 N. Y., 379); *Trustees of Baptist Church v. Robinson* (21 N. Y., 234); *Dodge v. Gardner* (31 N. Y., 244); *Merrick v. French* (2 Gray, 420); *Bryant v. Goodrows* (5 Pick., 228); *Farrington Academy v. Allen* (14 Mass., 172).

ANDREWS, J. The writing, signed by the defendant and others, was not a contract with the plaintiff, nor was it an open authority to him or to any other persons to take legal proceedings in behalf of those executing it. The language of the instrument implies that the person signing it had a common interest in the action of the board of health, and a common right to be maintained in opposition to it. But it does not



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Opinion of the Court, per ANDREWS, J.

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import that they were jointly interested in conducting the business to which the action of the board related.

The agreement was the several undertaking by the subscribers to contribute to a common fund to maintain, by litigation, a general right asserted by them, upon which their separate interests depended.

The paper conferred no apparent authority on any one of the signers to bind the others by an agreement with counsel. Each of the subscribers had equal authority with the others, and also were entitled to be consulted in the selection of counsel, and as to the extent of the liability to be incurred in the proposed litigation.

The defendant was not bound by the act of Shuster and others in engaging counsel and fixing his compensation, unless he authorized or ratified it.

There is no direct proof that such authority was given. The plaintiff testifies that he was employed by two or three of the persons who signed the agreement to commence actions to establish the right claimed by the defendant and others. He had no communication with the defendant, but he speaks of the persons who employed him as having acted for the defendant, and as the committee appointed by the butchers.

It appears, however, by his subsequent testimony, that all the knowledge he had that a committee had been appointed to engage counsel was derived from the statement of the persons who employed him. This was mere hearsay, and before the defendant could be bound by their declarations or acts, the fact of their agency must have been established. There is no proof that, in fact, any committee was appointed by the subscribers for any purpose.

The general statement of the plaintiff that the committee who employed him acted for the defendant, if unchallenged, might have justified the finding that they acted by authority of the defendant. It would be assumed upon the statement, if no question had been raised.

But the defendant, on his motion for nonsuit, and at the close of the case, insisted that no appointment of a committee

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Opinion of the Court, per ALLEN, J.

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to act for him had been shown; and if the plaintiff designed to rest his case upon that fact, he was then called upon to furnish competent evidence to sustain it. This evidence was not given.

The court directed a verdict upon the assumption that it was proved, by uncontradicted evidence, that the employment of the plaintiff by the assumed committee was authorized by the defendant.

There was no competent proof that such authority existed, and the judgment should be reversed and a new trial granted. All concurring, judgment reversed.

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ALEXANDER TURNBULL et al., Respondents, v. JOHN T.  
MARTIN, Appellant.

The judgment upon an award under the statute can only be reviewed in this court by writ of error; an appeal will be dismissed.

(Argued May 18th; decided May 30th, 1871.)

APPEAL from a judgment upon an award entered in the Common Pleas of the city of New York, pursuant to a submission and the statute regulating arbitrations, for \$74,318.95, and also from the orders of the court directing the entering of the judgment and refusing to vacate the award.

*A. J. Vanderpoel*, for the appellant.

*Samuel Hand*, for the respondent.

ALLEN, J. The remedy of the appellant for any supposed errors of the court below in refusing to vacate the award and ordering judgment thereon, was by writ of error, not by appeal.

Proceedings under the Revised Statutes relating to arbitrations are expressly excluded from the operations of the Code

## Statement of case.

and the remedies given by it. (Code, 47, § 1.) The point has been adjudicated by this court in several cases, two of which are reported, and the question is no longer an open question. (*Isaacs v. Beth. Hamedrash Soc.*, 19 N. Y., 584; *Freeman v. Kendall*, 41 id., 518.) The judgment upon an award under the statute can only be reviewed in this court by writ of error. The appeal must be dismissed with costs.

All concurring,

Appeal dismissed.

JAMES BRIDGER, Respondent, v. HENRY R. PIERSON,  
Appellant.

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| 129 | 268 |

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| 45  | 601 |
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| 45  | 601 |
| 165 | 175 |

A deed with covenants for quiet enjoyment contained the following clause:

"Reserving always a right of way, as now used, on the west side of the above described premises, for cattle and carriages, from the public highway to the piece of land now owned by R."—*Held*, that, although strictly a *reservation* in a deed is ineffectual to create a right in any person not a party thereto, yet there being, in fact, a right of way existing, at the time of the grant in R., such clause must be construed as an *exception* from the property conveyed; and that the grantor was not liable to the grantee as for a breach of his covenant.

Where the language used is susceptible of more than one interpretation, courts will look at the surrounding circumstances existing when the contract was entered into, the situation of the parties and of the subject-matter of the instrument. To this extent, extraneous evidence is admissible to aid in the construction of written contracts.

(Argued May 23d; decided May 30th, 1871.)

APPEAL from the judgment of the late General Term of the Supreme Court, in the seventh judicial district, affirming the judgment of the Special Term, entered upon the report of a referee in favor of the plaintiff.

In April, 1849, the defendant conveyed to the plaintiff, by deed, fifty-four acres of land, "reserving, always, a right of way, as now used, on the west side of the above described premises, for cattle and carriages, from the public highway

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to the piece of land now owned by Samuel B. Reeves, lying north of and adjoining the premises herein conveyed." There was a covenant for quiet enjoyment. Subsequently, the defendant executed to the plaintiff a quitclaim deed of the same premises, containing no reservation of the right of way. The consideration of this deed was five dollars. In 1860, Reeves brought an action against the plaintiff to recover the use of the private way claimed to be owned by him, alleging that it had been obstructed by the plaintiff. Reeves claimed to own the way by prescription. Due notice was given to the defendant requiring him to defend the action. Reeves established, by judgment, the right of way in question, and recovered damages and costs. This action was brought to recover for the costs and damages incurred by the plaintiff in defending such suit, after notice.

*Henry R. Selden*, for the appellant, cited *Moore v. Jackson* (4 Wend., 69); *Sheppard's Touchstone*, 86; *French v. Carhart* (1 N. Y., 96, 102); *Wright v. Kemp* (3 T. R., 473); *Jackson v. Topping* (1 Wend., 396, 397); *Jackson v. Myers* (3 John., 388, 395); *Nash v. Towne* (5 Wall., 699); *Broom's Leg. Max.*, 298; *Co. Litt.*, 143; *Thomas' ed. of Coke*. vol. 2, 412; *Doe v. Locke* (2 Ad. & Ellis, 724); *Voorhees v. Presb. Church* (19 Barb., 108, 109); *Clanrickard's Case*, Hob., 277, b.; *Darling v. Rogers* (22 Wend., 489); *Dubois v. Ray* (35 N. Y., 166).

*S. K. Williams*, for the respondent. In this case an easement was reserved to the grantor only. (*Hornbeck v. Westbrook*, 9 John., 73.) A reservation to a stranger is void. (*Moore v. Earl of Plymouth*, 3 Barn. & Ald.; *Ives v. Van Auken*, 34 Barb., 566; *Craig v. Wells*, 1 Kern., 332.) On the question of breach of covenant. (*Harlow v. Thomas*, 15 Pick., 66; 2 Mass., 79; *Rawle on Cov. for Title*, 226.) The deed might be introduced in evidence. (*Fountain v. Pettee*, 38 N. Y., 184; *Merritt v. Seaman*, 6 Barb., 330.) On the question of exceptions taken. (*Stone v. W. T. Co.*, 38 N. Y.,

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240; *Wheeler v. Billings*, 38 N. Y., 263; 31 Barb., 171; 2 Trans. App., 298; 33 N. Y., 83; 2 Seld., 233; 1 Kern., 416; 5 Denio., 218.)

GROVER, J. The plaintiff having given notice of the action brought by Reeves against him to establish his right of way over the land embraced in his deed, and requested him to assume the defence thereto, the judgment recovered therein, establishing such right of way in Reeves, was conclusive evidence against the defendant of the existence of such right. (*Miner v. Clark*, 15 Wend., 425.) The recovery of this right by the judgment in that action and enforcing its enjoyment by Reeves pursuant to the same was such an eviction as to constitute a breach of the covenant for quiet enjoyment contained in the deed, if the covenant by its true construction embraced such right. This is conceded by the counsel for the appellant. The real question in the case is whether the covenant was against this right of way in Reeves. The deed describes the land intended to be conveyed by metes and bounds, succeeding which is the following clause, "reserving always a right of way as now used on the west side of the above described premises for cattle and carriage, from the public highway to the piece of land now owned by Samuel B. Reeves, lying north of and adjoining the premises herein conveyed." Reeves not being a party to this deed, could not acquire any right of way or other interest in the land by virtue of any reservation or exception contained in it. (*Shep. Touch.*, 78; *Hornbeck v. Westbrook*, 9 Johns., 73; *Craig v. Wells*, 1 Kern., 323.) But Reeves did not claim this right under the deed. The record shows that he established his right by an adverse user for more than twenty years prior to the giving of the deed by the defendant to the plaintiff. The question is whether the clause above referred to excluded such right from the operation of the covenant. If it can be construed as a technical reservation only, it clearly did not. A reservation is never of any part of the estate itself but of something issuing out of it or some right to be exercised by the

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grantor in relation to the estate. (*Craig v. Wells*, *supra*, and authorities cited.) But a deed must be so construed as to give effect to the intent and design of the parties, manifested by the language used. (Shepherd's Touchstone, 86; *French v. Carhart*, 1 N. Y., 96.) This is enjoined by statute. (1 R. S., 748, § 2.) That section provides that in the construction of every instrument creating or conveying or authorizing the creation or conveyance of any estate or interest in lands, it shall be the duty of courts of justice to carry into effect the intent of the parties, so far as such intent can be collected from the whole instrument, and is consistent with the rules of law. It follows, that if it appears that it was the intention of the parties to exclude the right of way of Reeves over the land from the operation of the covenant, that it is the duty of the court to give effect to such intent. In *French v. Carhart* (1 Comst., 96), JEWETT, Ch. J., says: "Too much regard is not to be had to the proper and exact signification of words and sentences, so as to prevent the simple intention of the parties from taking effect. And whenever the language used is susceptible of more than one interpretation the courts will look at the surrounding circumstances existing when the contract was entered into; the situation of the parties and of the subject-matter of the instrument. To this extent, at least, the well settled rule is that extraneous evidence is admissible to aid in the construction of written contracts." (See authorities cited at page 102.) Applying these rules to the present case, we find that, at the time of the conveyance, Reeves was entitled to a right of way over the west side of the land proposed to be conveyed, from the highway to his farm, for carriages, cattle, etc.; that he had had the actual use of such way for a long time previous thereto, during most of which time the strip over which the right of way existed had been fenced as a lane. These facts were known to the parties, and even if not known to the plaintiff, the language of the clause under consideration could scarcely have failed to convey to him full knowledge of the facts. It was a reservation of a right of way as now used

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Opinion of the Court, per GROVER, J.

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for cattle and carriages, from the public highway to the piece of land now owned by Samuel B. Reeves, lying north of and adjoining the premises conveyed. The plaintiff, from this, must have understood that such right of way was appurtenant to the land then owned by Reeves, and that it would pass as such to a purchaser of the land under a conveyance. This being so, he could not have understood that the defendant designed to reserve to himself a right of way as then used, but that he designed to except the right of way appurtenant to the farm of Reeves from the operation of the conveyance, and to convey the fee to the plaintiff subject thereto. Otherwise, why any reference to the farm of Reeves? Why not a simple reservation of the right over the west side of the lands conveyed, without reference to the purpose for which its use was desired, to reach the farm of Reeves? The defendant, if only desirous of retaining for himself a right of way in future, would hardly refer to its then use as a right of way. He owned the fee, and consequently, as such owner, had a right of way over any and every part of it for any and every purpose. If, as suggested by the plaintiff's counsel, the plaintiff owned land north of Reeves' land, and that the right was reserved for his accommodation in respect to such land, why was not that land referred to in the reservation instead of the land of Reeves? The extrinsic facts clearly show that it was the right of way appurtenant to the land of the latter, which was designed to be excepted from the deed. We have seen that such intention cannot be made effectual by construing the clause as a reservation, but that it may be by regarding it as an exception, and thus making the fee conveyed subject to this right of way. So conveying the fee would be consistent with the rules of law. It is the duty of the court so to construe the clause. By so doing, the intention of the parties will be effected. The judgment appealed from must be reversed and a new trial ordered, costs to abide the event.

All agreeing. ✓

Judgment reversed.

## Statement of case.

RICHARD S. WARING et al., Respondents, v. THE INDEMNITY  
FIRE INSURANCE COMPANY, Appellant.

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| 129 | 244 |
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| 129 | 57  |
| 129 | 137 |

A policy of fire insurance taken out by commission merchants upon goods "sold but not removed,"—*Held*, to cover all goods which, having once belonged to the insurers, or having once been held by them on commission, had been fully sold and technically delivered, the title and the right of possession changed, but the articles not yet actually removed from the place of storage.

The law does not forbid that a policy should be so framed as that the insurance shall be inseparably attached to the property intended to be covered, so that successive owners, during the continuance of the risk, shall become, in turn, the parties really insured.

Agents, commission merchants, or others, having the custody of and being responsible for property, may insure in their own names, and recover of the insurer not only a sum equal to their own interest in the property, by reason of any lien for advances or charges, but the full amount named in the policy, up to the value of the property.

A person may insure in his own name the property of another for the benefit of the owner, without his previous authority; and such insurance will inure to the party intended to be protected, if adopted by him, even after loss has occurred. It must be shown that insurance of the owner was the intention of the person effecting the insurance, when the contract was made, but such intention need not have fastened, at the time of entering into the contract, upon the very person who, when the contract matures, seeks to take the benefit of it. *FOLGER, J.*

Accordingly, where A, the owner of property, effected an insurance upon it, the policy containing this clause, "sold, but not delivered," and subsequently sold it to B, holding it for him without charge, and it was burned,—*Held*, that the risk followed the property, and that an action was maintainable by A for the value of the policy, in trust for B.

(Argued May 26th; decided June 6th, 1871.)

**APPEAL** from the judgment of the General Term of the Supreme Court, in the first judicial district, affirming the judgment of the New York circuit in favor of the plaintiff.

The plaintiffs were commission merchants, and brokers in petroleum and its products. They also bought and sold on their own account. To cover all their interests and those which they represented, they took such policies of insurance as were adapted to the various exigencies of their business, and the



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necessities of the persons with whom they dealt. A part of their business was to sell petroleum for export, and it was an advantage to them in their business to have the property covered by insurance during the brief time between the sale of it and its removal from the bonded warehouse to the vessel. This saved a new insurance, which would be needed only for a few days. On the 13th day of September, 1865, the plaintiffs obtained in New York city eleven policies of insurance with as many different companies, in the aggregate \$30,000. The written part of the policy was as follows: "Do insure Warring, King & Co. against loss or damage by fire to the amount of \$3,000 on refined carbon oil and packages containing the same, their own, or held in trust on commission, or sold, but not removed, contained in bonded warehouse." \* \* \* Subsequently part of the property was sold. The purchasers of the oil were informed by the plaintiffs that the property was covered by insurance until removed. No independent insurance was effected upon it. On the 8th day of October, 1865, there was a total loss by fire, the amount of property destroyed amounting to nearly the full face of the policies. All the companies, with the exception of the defendant and one other, paid their proportion of the loss. The plaintiffs sue for themselves in their own right, as well as on account of petroleum sold to different parties and paid for, but not removed, and which was destroyed at the time of the fire. This latter formed a large proportion of the loss. An exception as to admission of testimony is sufficiently stated in the opinion.

*Wheeler H. Peckham*, for the appellants.

*F. F. Marbury*, for the respondents, on the question of construction of policy. (*Pindar v. Kings County Ins. Co.*, 36 N. Y., 650; a stronger case than *Stilwell v. Staples*, 19 N. Y., 401; see also *Herkimer v. Rice*, 27 N. Y., 180; *Rolker v. Great Western Ins. Co.*, 3 Keyes, 17.) Property may be insured for the benefit of another not named in the policy. (*Herkimer v. Rice*, 27 N. Y., 179; *Stilwell v. Staples*, 19 N. Y.,

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403; *Lee v. Adsit*, 37 N. Y., 86; *Watson v. The Monarch F. and L. Ins. Co.*, 5 Ell. & Black., 870.) As to construction of section 113 of the Code. (*Walsh v. Wash'n Ins. Co.*, 32 N. Y., 427; *Siter v. Morse*, 13 Penn., 220; *Goodall v. N. E. M. and F. Ins. Co.*, 5 Foster, 169, 186; *Rogers v. The Traders' Ins. Co.*, 6 Paige, 596.) At the common-law, even if the contract was with persons having no interest at all, a contract of assurance was good. (*Dolby v. The India and London Life Ins. Co.*, 15 Com. B., 365, E. C. L. R., vol. 80; *Waters v. Monarch F. and L. Ins. Co.*, 5 Ellis & Black., 875, 879.)

FOLGER, J. Though there was a time, after the making of the policy, at which the property was covered by it, and the plaintiffs were insured by it, it must be conceded that when the property was destroyed by fire, the plaintiffs had no such interest in it, as that they suffered any immediate pecuniary loss. The proof is, that they had sold the oil and received their pay. The proof also is, that the oil was on store in a United States bonded warehouse, and that, by the delivery of invoices and gauger's certificates to vendees of the plaintiffs, there had been a complete delivery of the property to the vendees, according to the custom of the trade. Nothing more was to be done to it by the vendors to enable the vendees to remove it. But the place of storage had not been changed. It remained on store, where it had been deposited by the plaintiffs, without expense to the vendees. It was also testified (under the defendant's objection), that the plaintiffs, according to custom in Philadelphia, retained the possession of it. It is evident, that the plaintiffs had no property in the oil, nor any lien upon it for purchase-money, or any charges of any kind. But they did have the possession of it by the consent of vendees, and thus the right to possession as against all the world but the vendees.

Under this state of the facts, it is to be determined whether the contract of insurance may be so construed, either from its language, or from the surrounding circumstances, as that it can be determined that the defendants meant to continue the

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risk taken upon this oil after it was sold and delivered by the plaintiffs; and, also, whether they meant to insure the pecuniary interest in it of any other persons than the plaintiffs.

We have but little difficulty in holding from the peculiar phraseology of the policy, that something other was meant than property, of which a contract of sale had been made, but of which no delivery had yet taken place. "Sold but not delivered," is a phrase common with insurance men, and has an ascertained and definite meaning. It applies to property of which a contract of sale has been made, but of which the ownership has not been changed by a delivery in pursuance of the contract. "Sold but not removed," is another, and we deem a newer form to express something else. We judge that it was meant to cover that which had been sold, and of which a legal, binding delivery had been made, the ownership and right of control of which had passed, but which had not been in fact removed, of which no change of place indicated a change of ownership and possession. It is easy to be seen, that it might be an advantage and a convenience to the plaintiffs to have a policy which would thus cover property, once theirs for sale, but after that sold and delivered and paid for. In the great rapidity, number and value of the transactions in such a commodity, in such a market, such an insurance would much facilitate the business of both parties, increasing that of the vendors and making safe that of the vendees. If the plaintiffs had a shifting policy, which would change with their daily transactions in the property, and cover it to-day as in the ownership of the plaintiffs, the next day as that held by them in trust or on commission, and the next as that of some complete vendee, who had not yet had the time or the occasion to remove it, much time, trouble, care and expense would be saved to customers, and thus would arise a persuasive inducement for dealers to become the vendees of these plaintiffs. Thus it is to be seen that the adoption of this phraseology, novel, and taking in property not theretofore or without it covered by the terms

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of a policy, had a purpose on the part of the assured, one which was voluntarily and intelligently acceded to by the insurer. For though the use of it increased in some degree the burden upon the company, it could not have been by the company inserted in the policy aimlessly, or without comprehension of its meaning. I do not, from the whole written description of the property to be covered by the policy, doubt that such was its meaning. It comes to this by natural steps. The risk is taken "on refined carbon oil." *First*, "their own; *i. e.*, that which the plaintiffs, during the term, held as their own property, owned and possessed by them. *Second*, "held in trust;" *i. e.*, that of which they had the care and custody, intrusted to them as representatives of others, and for which they are responsible to the owner (*Stillwell v. Staples*, 19 N. Y., 401); and in this term may be included that which they had sold but not delivered. *Third*, "held on commission;" *i. e.*, that which they held, coming into or continuing in their care and custody for the purpose and with the duty of sale. *Fourth*, that which was "sold but not removed," an additional phrase, not to be supposed a repetition of the meaning of the others, but to have been used as an addition to their meaning, taking in that which, once having been their own, or once having been held by them on commission, had been fully sold and technically delivered; the title and the right of possession changed, but not yet removed from that place of storage. The phraseology comprehends all this, and goes naturally and regularly, as expressive of a well-formed intention to comprehend all, and to affix the indemnity of the contract to the property in whatsoever of these conditions it should be, and throughout them all. And, provided that there is some one in fact beneficially interested in the policy as an assured, there is nothing contrary to the policy of the law in intending and effecting such an insurance, and it may be upheld. For here is an actual subject of a risk, and the proviso being met, there is a person who has an interest in the subject, and is himself affected by the risk. We have, then, here, a policy which did, in its inception, by

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its terms, cover this particular property, and did designedly cover it. And we have a policy, by which it was meant by insurer and insured that the risk taken should cover and adhere to the same property, after it had left the ownership of the persons designated by name in it; by which, necessarily, it was also meant to follow and to cover that property in the ownership of the vendee of the original owner named in the policy. It is not forbidden by the law that a policy should be so framed as that the insurance shall be inseparably attached to the property meant to be covered, so that successive owners, during the continuance of the risks, shall become, in turn, the parties really insured. (2 Duer on Ins., 49, Lecture 9, § 31.)

But it remains to be seen whether this contract of insurance could be made or continued in the name of the plaintiffs for the benefit of their vendees not especially designated. It is laid down in broad terms that one may, in his own name, insure the property of another for the benefit of the owner without his previous authority or sanction, and that it will inure to the benefit of the owner upon a subsequent adoption of it, even after a loss has occurred. (Angell on Ins., § 79, cited and approved by DENIO, Ch. J.; *Herkimer v. Rice*, 27 N. Y., 163-81.)

In the edition of Angell which is before me (Boston, 1844), the authorities cited to sustain this proposition disclose some relation existing between the person who effected the insurance and was named in the policy, and the property insured, either as the agent for the owner or as the occupant of the property, or as having the care, possession and control of it, as bailee. Agents, commission merchants or others, having the custody of, and being responsible for, property, may insure in their own names; and they may, in their own names, recover of the insurer not only a sum equal to their own interest in the property by reason of any lien for advances or charges, but the full amount named in the policy up to the value of the property. In all such cases, the right to insure and the right to recover seem to be founded upon

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the relation above adverted to. (See *De Forrest v. Fulton Ins. Co.*, 1 Hall Sup. Ct. Rep., 84; *Stillwell v. Staples*, 19 N. Y., 401; *Siter v. Motts*, 1 Harris Penn. St. R., 218.)

The right is put upon the fact, that having the possession of the property exclusive as to all but the owner, to whom they are responsible, they have the right to protect from loss, so that it or its value may be rendered to the owner when he calls for his own. Now there did in this case exist a relation between the plaintiffs and the property and its owner. Although it had been sold and paid for, and, in legal contemplation, delivered, its place of storage had not been changed. For the purpose of saving expense in storage, for the purpose also, it may be inferred from all the circumstances, of saving expense of a new insurance, it was left in the same warehouse, and by the custom of the trade, as is said, in the possession still of the plaintiffs. Thus was established that relation, which enabled the plaintiffs to prolong the defendant's risk upon the property. And although the vendees of the plaintiffs, the owners of the property, are not by name or peculiar mention designated in the policy, there are terms there, which have been held to bring within such a contract persons not named in it, but yet interested in the property insured, which may be done. (Phillips on Ins., 1 vol., p. 197, § 382; p. 202, § 388.) The phrases describing property "as held in trust," or "on commission," and kindred terms, in a policy to an agent, factor or the like, have been held as giving to the owner of the property a right to take the place of the insured, to adopt the contract, and to enforce it in his own name or that of his agent. (*Lee v. Adsit*, *supra*; *Stillwell v. Staples*, *supra*.) Some cases go farther than this, and hold that one may insure in his own name the property of another for the benefit of the owner, without his previous sanction or authority, and that it will enure to the party intended to be protected upon his subsequent adoption, even after a loss has occurred. (*Miltenberger v. Beacom*, 9 Barr. [Penn. St. R.], 198.) Of course, it must be made to appear that the owner was in the intention of the per-

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son effecting the insurance when the contract was made. (1 Phillips on Ins., p. 198, § 383.) Such intention need not have fastened at the time of entering into the contract upon the very person, who, when the contract matures, seeks to take the benefit of it. Otherwise policies to commission merchants, warehousemen, factors and persons in the position of these plaintiffs, in which are clauses of this general nature, would be of little avail. For, obviously, it cannot be foreseen who will, in the course of the term of the policy, come into such relations with them. And it is to be assumed that every one was in the intention of the insurer, who subsequently with design takes such relations to him as brings him within the clauses of the policy. The intention must have been to effect insurance for any person and all persons who during the running of the policy, should have goods within its description of property insured.

And such intention, we hold, appears from the phraseology of this policy. Bunker Brothers were vendees of the plaintiffs, of property "sold but not removed." One of that firm was a witness upon the trial of the case. Nothing shows that they repudiate the contract made or continued for their benefit. And though the action is in the name of the persons named in the policy, their recovery will be in trust for Bunker Brothers. (*Stilwell v. Staples, supra.*)

Section 113 of the Code declares that the term "trustee of an express trust," as therein used, shall include a person with whom or in whose name a contract is made for the benefit of another, and permits an action on the contract to be brought in the name of the trustee. So this action is properly brought in that respect.

The exception to the admission of testimony was not well taken. The objection was to the question put, and this called for no more than the agreement of the plaintiffs and their vendees as to storage. It was not improper or immaterial to show that they made it a part of their bargain that the oil should remain where it was, in the warehouse, without charge for storage, and that it remained in the possession of the plaintiffs.

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It was part of the whole arrangement between the plaintiffs and their customers, by which when oil was sold but not removed, it remained free from expense for storage, and covered by the prior policy of insurance. It could not, of course, force upon the defendants any contract different from the one which they made with the plaintiffs; but it was material to aid in showing with what purpose the peculiar phraseology of this policy was adopted. It was not in contradiction or explanation of, or addition to, a written contract. It was proof of a fact which existed after the sale and delivery, that though the sale and delivery were in legal contemplation complete, the subject of the sale remained in the vendor's possession, in accordance with a custom of the trade in that city. The judgment of the court below must be affirmed, with costs to the respondent.

All agree, except PECKHAM, J., who does not sit.

Judgment affirmed.

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FREDERICK A. YENNI, Appellant, v. JOHN McNAMEE, Respondent.

S. was the owner and in possession of a quantity of petroleum at his factory. His superintendent signed and delivered to him the following receipt: "Received on storage for account of S., 600 barrels petroleum, crude and refined, contained in tanks, and 700 barrels to hold the same, deliverable to his order on payment of the charges named therein, in accordance with the marginal note below. Storage, per month. Labor, "

No oil was set apart as covered or described by this receipt. This instrument S. transferred, by indorsement to B., for full value, as collateral security to a loan, the property all the while remaining at the factory. Subsequently, a levy was made by the defendant, as sheriff, under an execution against S., upon it. After the levy S., with the consent of B., sold and delivered a part of the goods to the plaintiff, who knew nothing of the receipt or its transfer, but supposed he was buying of S. They were retaken from him by the defendant.—*Held*, in an action against him therefor, that such receipt was not a warehouse receipt under the statute (Laws of 1858, chap. 826), and the plaintiff could not recover.



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Between S. and his superintendent, the instrument was a nullity. As between S. and B., it was in the nature of a chattel mortgage, and that being unrecorded, and the possession remaining in S., it was void as against creditors, and the levy made afterward was good. GROVER J.

(Argued May 19th; decided June 6th, 1871.)

APPEAL from the judgment of the General Term of the Supreme Court, in the second judicial district, affirming the judgment of the Special Term in favor of defendant.

This action was brought to recover 123 barrels of petroleum oil taken by the defendant. The answer sets up that the oil was the property of one Stokes, and had been taken by the defendant, as sheriff of Kings county, on execution, to satisfy two judgments, recovered by the Oneida County Bank against Stokes. On the 6th of December, 1866, Stokes, the judgment debtor, was the owner of and carried on an oil refinery in Brooklyn. W. H. Chapman was his superintendent. On the 6th of December, the following receipt was signed by him and delivered to Stokes.

"STERLING OIL WORKS, }  
"GREENPOINT, BROOKLYN, Dec. 6, 1866. }

"Received on storage, for account of Edward S. Stokes, 600 barrels petroleum, crude and refined; contained in tanks, and 700 barrels to hold the same; deliverable to his order on payment of the charges named thereon, in accordance with the marginal note hereto.

"Storage,                      per month. Labor,

"WM. H. CHAPMAN,

"Superintendent.

The receipt was not for any designated or separate parcel of oil, but was intended to cover oil, crude, refined, or in process of refining in the works, and empty barrels to hold it. On the 16th of December, the Ocean Bank loaned Stokes \$5,000, and received his note therefor, and, as collateral security, took the receipt above set out indorsed by him. There was no change of possession of the oil; none of it was set apart to answer the call of this receipt; and no one, on

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behalf of the bank, ever saw the oil. The execution, against Stokes, was delivered to the defendant on the 22d day of December, and on the same day, a deputy went to the works and levied on all the oil, barrels, etc., in the works, in the manner stated in the opinion. Stokes was authorized by the bank to sell the oil covered by the receipt, on account of the bank. On the 8th of January, 1867, Stokes sold to the plaintiff 150 barrels of oil. The oil was delivered from the works to a lighter, and paid for on delivery. Immediately after the oil was received by the plaintiff in New York, the sheriff reclaimed and took possession of the 123 barrels, by virtue of the execution and levy. The plaintiff knew nothing of the receipt, but dealt with Stokes as owner.

*Joshua M. Van Cott*, for the appellant, cited Laws of 1830, chap. 179, p. 203, § 3; Laws of 1858, chap. 326, p. 532, §§ 3, 6; *Gibson v. Stevens* (8 How. U. S., 384, 399 to 400); *Cartwright v. Wildenning* (24 N. Y., 521); *Sturtevant v. Orser* (24 N. Y., 538); *Dows v. Greene* (24 N. Y., 638); *Bonita v. Mosquera* (2 Bosw., 401, 445).

*Francis Kernan*, for the respondent. On the question of the levy. (*Barker, Sheriff, v. Binninger*, 14 N. Y., 270, 277, 278; *Green v. Burke*, 23 Wend., 490, 493; *Barker v. Miller*, 6 John., 195; *Dillenback v. Jerome*, 7 Cowen, 294, 297; *Dezell v. Odell*, 3 Hill, 215.) The Ocean Bank had no valid title to the property as against the judgment and execution. (*Gardiner v. Sugdam*, 3 Seld., 357, 362; *White v. Wilkes*, 5 Taunt., 167; S. C., 1 Eng. Com. Law, 98; *Austin v. Craven*, 4 Taunt., 643; *Field v. Moore*, Hill & Denio, 418; *Rapelye v. Mackie*, 6 Cow., 250; *Wilkes v. Ferris*, 5 John., 335, 344; 2 Kent's Com., 500.) To render a refusal to charge as requested error, the request must be in such form that the court is bound to charge the same without qualification. (*Carpenter v. Stillwell*, 11 N. Y., 61, 79; *Doughty v. Hope*, 3 Denio, 594, 599; S. C. Affd., 1 Seld., 79; see, also, *Winchell v. Hicks*, 18 N. Y., 558, 565, and cases cited.)

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GROVER, J. There was a valid levy of the execution made upon the oil in question. There was nothing for the jury to pass upon in respect to that. The proof was undisputed that the deputy sheriff, after receiving the execution, proceeded with it to the oil works, where the oil was in plain view and subject to his control, and there openly, in presence of the persons having the care of it, asserted that he levied the execution thereon, and forbade its removal, and that he subsequently made an inventory thereof. These acts were sufficient to constitute a levy. (*Barker v. Benninger*, 14 N. Y., 270.) The testimony of the elder Stokes did not show an abandonment of this levy. It was not, therefore, necessary to submit the question whether his was the true version of what occurred in the interview between him and the under sheriff, or whether the testimony of the officer in respect thereto was true, to the jury. Whatever title Stokes, the execution debtor, had to the oil, was subject to the lien of the execution, and so continued on the 8th of January thereafter, when he, through a broker, contracted to sell the same to the plaintiffs, and on the 14th of January, when he delivered the same pursuant to such contract, and received payment from the plaintiffs therefor. Stokes testified that he was authorized to make this sale to the plaintiffs by the president of the Ocean Bank. If, therefore, the bank had title to the oil as against the execution, the plaintiff, by his purchase from Stokes, acquired this title, and the judge erred in directing a verdict for the defendant. The question to be determined is whether the bank had such title. It was agreed by the parties upon the trial, that Stokes was the owner of the oil prior to the 6th of December, 1866. It was proved that for some time prior thereto he was the owner of a building and machinery in Brooklyn adapted to the business of refining oil, and that he had been for some time engaged in carrying on that business in the building; that Wm. H. Chapman was employed by him to superintend such business; that the oil in question, together with other oil, had been purchased by Stokes for the purposes of the business, and was then in tanks in said build-

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Opinion of the Court, per GROVER, J.

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ing, and that he had barrels in a shop for the purpose of barreling the same when refined. On the 6th of December Stokes directed Chapman to make the following receipt, which he accordingly made and delivered to Stokes:

"STERLING OIL WORKS, GREENPOINT, }  
December 6th, 1866. }

"Received on storage, for account of Edward S. Stokes, 600 barrels petroleum, crude and refined, contained in tanks, and 700 barrels to hold the same deliverable to his order on payment of the charges named therein, in accordance with the marginal note hereto. Storage, per month. Labor,

"(Signed)

WM. H. CHAPMAN,

"*Superintendent.*"

Stokes wishing to make a loan of the Ocean Bank, procured a discount of his note for \$5,000 by the bank, and to secure the payment thereof at the same time indorsed his name upon this receipt and delivered the same to the bank, by which it was retained until after the sale of the oil to the plaintiff. Of this receipt the plaintiff knew nothing, nor did he know of any claim of the bank to the oil at the time of the purchase and delivery of the same to him. This latter fact will not prejudice the title of the plaintiff, if, as claimed by his counsel, the bank acquired title to the oil, valid as against the execution by the indorsement and delivery of the receipt to it. This claim is attempted to be sustained upon the ground that the instrument was a warehouse receipt, within the meaning of section 6, chap. 326, Laws of 1858. That section, among other things, provides that warehouse receipts given for any goods, etc., stored or deposited with any warehouseman, wharfinger, or other person, may be transferred by indorsement thereof, and any person to whom the same may be so transferred shall be deemed and taken to be the owner of the goods, etc., therein specified, so far as to give validity to any pledge, lien or transfer made or created by such person or persons. The first inquiry is whether the instrument in question was a warehouse receipt within the

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meaning of the above section. Before examining this question, it is proper to notice that Edward S. Stokes testified that in the month of December prior to receiving the receipt from Chapman, he conveyed the oil works to his mother. It is urged by the counsel for the defendant that this changed the previous relations existing between Stokes and Chapman; that the latter thereafter ceased to be the employee of the former, and must be regarded as the agent of his grantee. The answer to this is, that there was no change of possession or change in the business; that Stokes continued in possession of the property, and to carry on the business the same after as before the conveyance until after the sale to the plaintiff. The conveyance was, therefore, immaterial. It is obvious that, as between Stokes and Chapman, the receipt was a mere nullity. It in no respect changed the possession of the oil or the rights and liability of either in respect thereto. The possession continued in Stokes, and all the duties of Chapman in regard to it were those of a mere servant. It is equally clear, that the plaintiff acquired no title by their purchase through the receipt held by the bank, unless the latter was the owner free from the lien of the execution, although the bank authorized the sale, for the reason that the plaintiffs knew nothing of the receipt, or of any claim of the bank at the time of the purchase, but bought of Stokes, as owner, in ignorance of any other title. Had their purchase been made of the bank, upon the faith of its ownership by virtue of the receipt indorsed to it by Stokes, their position might have been different. It is only purchases so made or liens so acquired that come within the letter or intention of the statute. The design was to protect parties dealing with the holder of the receipt upon the belief of his ownership founded thereon, although, in fact, he might not be the owner of the property, and have no power or authority to encumber it. The plaintiffs do not, therefore, bring their case within the section under consideration, and cannot derive any benefit therefrom. The inquiry is, did the bank acquire an absolute title to the property by the indorsement of the

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receipt to it by Stokes, so that it was not thereafter liable to be levied upon and sold upon an execution against him. To show that it did, the counsel relies upon section 3 (4 Statutes at Large, 461), of the act for the amendment of the law relative to principals, factors or agents. But that section has no application to the case. Stokes was the owner of the property. He was in no sense the factor or agent of any other person who was the owner. The only purpose of that section was to protect parties dealing in good faith in regard to property with agents and factors of owners who had intrusted such agents with the possession of the property or the instruments showing the apparent title in them, who had sold or encumbered the property in violation of their duty to their principals. It is not any other owner of the property claiming it as against the bank, upon the ground that Stokes had disposed of it in violation of the instructions of such owner. Were that the case, the section under consideration would constitute a perfect defence. But this is the case of a judgment creditor of Stokes pursuing the property by execution, and it is incumbent upon the plaintiffs to show that the bank had acquired such a title as to exempt it from levy thereon. There is no doubt but that Stokes intended to confer some title to the property by indorsing and delivering the receipt to it; and the bank, by accepting it, intended to acquire an interest in the property. Although the mode adopted was informal, it was, I think, effectual to accomplish the object of the parties. A transfer of a warehouse receipt by indorsement, with intent to transfer the title to the property specified therein, is effectual under the law merchant, independent of the statute, to transfer the title. (*Gibson v. Stevens*, 8 Howard's U. S. Reports.) Had Stokes, therefore, indorsed and delivered the receipt to the bank in good faith, upon an absolute sale of the property to the bank, I am not prepared to say that the bank would not thereby have acquired the title, although the receipt was a mere fiction between Stokes and Chapman. Both of the latter would have been estopped from denying

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that the receipt was based upon a real transaction. This estoppel would have been equally effectual against all claiming under Stokes upon a title subsequently acquired. The title having passed from him to the bank, he could not divest such title, and could not, therefore, transfer any to another person. But Stokes transferred the receipt, and, therefore, the title to the property, as a mere security for the payment of his note. It was, therefore, a mere mortgage security. Section 1 (4 Statutes at Large, 435), provides that every mortgage or conveyance intended to operate as a mortgage of goods and chattels, thereafter made, which shall not be accompanied by an immediate delivery, etc., shall be absolutely void as against the creditors of the mortgagor, unless filed as required by the act. There was no compliance, in this respect, with the act. It has before been remarked, that the receipt was a mere fiction; that Stokes continued in the possession of the property until the levy was made. To make a mortgage given by him thereon a valid security against his creditors, he must either be divested of the possession, or the mortgage must be filed as required by the act. The making of a fictitious paper, showing an apparent change of possession, when none in fact is made, is not a compliance with the statute, but, if held effectual, would work a complete evasion. It may be said that, if this be correct, there will be no safety in acquiring title to property as a security, by the indorsement of a genuine warehouse receipt. The answer to this is, that when such a receipt is given, the owner parts with the possession by delivering the property to the warehouseman as his bailee. Upon taking the receipt, it becomes the duty of the bailee, under the statute, to retain possession until the receipt is returned, or its non-production satisfactorily accounted for. Upon the indorsement and delivery of the receipt to a third person as a security, the title and right of possession passes to the transferee, and the warehouseman at once, without any notice, becomes bailee of the latter. (*Gibson v. Stevens, supra.*) This works all the delivery and change of possession of which the subject of the transfer is

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capable, and is a compliance with the statute in that respect, and the transaction therefore valid.

The judgment appealed from must be affirmed, with costs.

All agree to the result on the ground that the paper writing signed by the superintendent of Stokes was not a warehouse receipt, under the act. FOLGER, J., did not sit.

Judgment affirmed.

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BOEDEN H. MILLS and another, Respondents, v. THE MICHIGAN  
CENTRAL RAILROAD COMPANY, Appellants.

Where goods are received by a carrier for transportation, marked for a destination beyond the terminus of such carrier's route, the notice to the next carrier of their arrival and readiness for delivery need not be actually brought home to the knowledge of such next carrier; but where the uniform custom of doing business between them was for the first carrier to deposit such notice in a special box in its own depot, to which the next carrier had constant access and was accustomed to look for notices, such deposit is sufficient. (FOLGER, J.)

But, in addition to the giving of notice of arrival to the carrier next in the line, a reasonable time must elapse for him to take away, and on his neglect to do so, a storage must be made, or some act, indicating a renunciation of the relation of carrier, be done by the first carrier, to relieve him from a common carrier's liability. And where the first carrier was a railroad company, and the next a propeller line on the great lakes, and it was the custom to ship the goods by the first vessel of the line that could take them after their arrival at the railroad terminus.—*Held*, that the reasonable time, which must elapse after notice, did not expire until a vessel which, in the ordinary course of business, could receive the goods, had failed to do so.

The provisions of the charter of the Michigan Central Railroad with reference to storage at its depots, and exemption from liability, except as warehousemen,—*Held*, not to affect their liability as an intermediate carrier in such a case.

(Argued April 27th, and decided May 30th, 1871.)

APPEAL from the judgment of the General Term of the Supreme Court, in the third judicial district, affirming the judgment of the Special Term in favor of the plaintiff.



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Statement of case.

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This action was brought to recover the value of 298 bags of wheat, which were shipped on the defendant's road at Kalamazoo, Michigan, on the 16th of October, 1865, to go to Detroit by rail, and thence to Buffalo, N. Y., by propellers on the lakes, thence to Albany, N. Y., by the New York Central railroad. The bags were consigned to Mills & McMartin, Albany, N. Y., by lake and rail, but no way bills or shipping receipts were delivered to the plaintiff's agent at Kalamazoo. The property duly arrived at Detroit, one car load on the 17th and the other on the 18th of October, where it was destroyed by fire, which burned the freight warehouses of the defendant on the evening of the last mentioned day. The defendant was accustomed to ship goods marked like these ("by lake and rail") by the New York Central propeller line, running to Buffalo, and by the first vessel that could take them, after their arrival at Detroit. It was the established usage that the agents of the several lines on the lake should receive notice of the arrival of goods consigned to go forward by their respective lines, by notices deposited in boxes designated for them, at the freight office of the defendant at Detroit. These notices were made out on the arrival of the goods. The practice was uniform and fully recognized by all the agents. The notice in this case was duly made and deposited. The property was ready to go forward on the day it was burned, but no boat was ready to take it.

The charter of the defendant was also introduced by it in evidence. Section 16 provides: "The said company may charge and collect a reasonable sum for storage upon all property which shall have been transported by them upon delivery thereof at any of their depots, and which shall have remained at any of their depots more than four days. *Provided*, that, elsewhere than at their Detroit depot the consignee shall have been notified, if known, either personally or by notice left at his place of business or residence, or by notice sent by mail, of the receipt of such property, at least four days before any storage shall be charged, and at the Detroit depot such notice shall be given twenty-four hours (Sundays excepted) before any

## Statement of case.

storage shall be charged; but such storage may be charged after the expiration of said twenty-four hours upon goods not taken away. *Provided, that in all cases, the said company shall be responsible for goods on deposit in any of their depots awaiting delivery, as warehousemen, and not as common carriers.*" The defendants also gave in evidence as a construction of this proviso, the report of *Hale v. Michigan Central R. R. Co.* (6 Mich., 243.)

*Amasa J. Parker*, for the appellant. On the meaning of "delivery and awaiting delivery." (Edwards on Bail., 528, 530; *Garside v. The Trent Nav. Co.*, 4 Term. R., 581.) On the question of notice and liability, *McDonald v. West. R. R. Cor.* (34 N. Y., 497, 500); *Van Santvoord v. St. John* (6 Hill, 157); *Thomas v. B. and P. R. R.* (10 Met., 472); *Norway Co. v. B. and M. R. R.* (1 Gray, 263); *Goold v. Chapin* (20 N. Y., 259); *Hempstead v. N. Y. C. R. R.* (28 Barb., 485); *Fisk v. Newton* (1 Denio, 45); Angel on Carriers, § 75; Story on Bail., § 449; Redfield on Railways, 254, § 8; Pierce on R. R. Law, 435, *et seq.*; 27 Vermont, 110; 32 N. H., 523; 22 Conn., 1. The contract having been made in Michigan, and to be performed there, must be governed by the law of that State. (2 Kent's Com., 454, 458; Story on Con. of Laws, § 76, *etc.*; *Waldron v. Ritchings*, 9 Abb., N. S., 368; *Pen. and Or. Steamship Co. v. Shand*, 3 Moore P. C., 272.)

*Samuel Hand* and *Matthew Hale*, for the respondent. On the question of liability, *McDonald v. W. R. R. Cor.* (34 N. Y., 497); *Ladue v. Griffith* (25 N. Y., 364); *Miller v. Steam Nav. Co.* (6 Seld., 431); *Goold v. Chapin* (20 N. Y., 259); *Blumenthal v. Brainerd* (38 Vermont, 413); *Moses v. B. R. R.* (32 N. H., 523); *Morris R. R. v. Ayres* (5 Dutch. [N. J.], 393); *Brentnall v. S. R. R. Co.* (32 Vermont, 665); *American Co. v. Baldwin* (26 Ill., 504); *Wood v. Crocker* (18 Wis., 345); *Angle v. Miss. R. R.* (9 Iowa, 487); *Gt. West. R. R. v. Crouch* (3 Hurst & Norm., 183); *Buckley v. Gt. Western R. R.* (18 Mich., 121); *McMullen v. Mich. Sou. R.*

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Opinion of the Court, per FOLGER, J.

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*R.* (16 Mich., 79). Construction of the charter, *Mich. R. R. Co. v. Ward* (2 Mich., 539); Dwarris on Stat., 764; *Wayman v. Southard* (10 Wheat., 130); Laws of 1848, 442, § 2; 6 Seld., 431; 20 N. Y., 264. The *lex fori* governs. (*Bissell v. Northern Ind. and C. R. R.*, 22 N. Y., 260, 263; *Hyde v. Goodnow*, 3 Comst., 266; *Jewell v. Wright*, 30 N. Y., 259; *Gaur v. Frank*, 36 Barb., 320; *Decouche v. Lavetier*, 3 John. Ch., 190.) The defence of a foreign law must be pleaded to be available. (*Monroe v. Douglass*, 1 Seld., 447.)

FOLGER, J. Unless the defendants were relieved from their liability as common carriers by the provision in their charter to be noticed hereafter, they could only be discharged therefrom by a delivery of the wheat to the next carrier in the line of transportation, or by a notice to him that it was ready for delivery, and the lapse of a reasonable time for him to take it away, and in the event of his neglect so to do, the proper storage of the same, or by the doing of some act indicating a renunciation of the relation of carrier. (*McDonald v. West. Trans. Co.*, 34 N. Y., 497; *Goold v. Chapin*, 20 N. Y., 259.) The wheat was not actually delivered, nor is it shown that notice of its arrival was actually brought home to the next carrier in the line of transportation. Notice was given, however, according to a custom prevalent with the defendants and carriers who were used to take goods from them. This custom was to deposit a written notice of the presence of freight in a letter box appropriated to the particular carrier by whose line the freight was to go. To this box the succeeding carrier had constant access. The custom was uniform and fully recognized by all connecting lines. But it is not shown that the plaintiffs or their agent who shipped the wheat from the initial point of carriage knew of this custom. If the plaintiffs are to be considered as contracting with a reference to this custom of the defendants and their connecting lines, then it must be held that the deposit in the proper box of the notice to the succeeding carrier was all the notice to him, which the law required of the

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Opinion of the Court, per FOLGER, J.

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defendants. And the rule seems to be, in this State, that the shipper of goods, where there is no express contract, is held to have agreed with the carrier for the transportation and disposal of them in the way usual and customary with the carrier. (*St. John v. Van Santvoord*, 6 Hill, 157.) But there needed not only notice to the carrier next in line, of the arrival of the wheat, but a lapse of reasonable time for him to take it away, and in his neglect so to do, some disposition of it by the defendant, indicating its intention no longer to be charged as carriers of it. What shall be a reasonable time is also to be determined by the circumstances of each case. It appears, from the testimony, that this wheat was received by the defendants, to be delivered by them to a propeller of the New York Central railroad line of propellers on Lake Erie, and that, in such case, the defendant shipped the goods by the first vessel of that line which could take them after their arrival in Detroit. Here, then, was a question to be determined in their favor, before the defendant could claim that they were discharged from their liability as common carriers. And we think that, as it was the custom of the defendants to bring forward to Detroit merchandise designed to be shipped through the lake by this propeller line, and to then ship it by the first vessel of the line which could take it after its arrival, the reasonable time, which after notice to the propeller line, that line had to take away the goods, did not expire until there was a vessel, which, in the ordinary course of business, could take the goods away. The custom of the defendants should operate against them in this respect, as well as for them in respect to the giving of notice. And it is to be held that they made their contract affording this reasonable time to the shipper and the succeeding carrier, just as the shippers made their contract that notice deposited in the box should be a good notice of the arrival of the goods. There is no proof in the case, but that the wheat would have gone forward, had it not been destroyed, by the first vessel of the line of propellers which could take it. And the defendants having contracted

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Opinion of the Court, per FOLGER, J.

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to take it from Kalamazoo, and so to ship it forward from Detroit, were not, from anything which appears in this case, discharged from their liability as common carriers of the wheat. For though notice was given of its arrival, reasonable time for taking it from the custody of the defendants had not elapsed, nor had the defendants done any act of storage or otherwise which changed their relation to the plaintiffs of common carriers of the wheat.

Neither do we think that the section from the charter of the defendants, which was produced at the circuit, and to which our attention has been called, has the effect to relieve them. The design of that section is to accord a right to the defendants, to wit, that of charging a price for the storage of goods after certain notice and after holding the goods for a certain time. The proviso which the section contains, and which is relied upon by the defendants to limit their liability in this case, does not act independently of the rest of the section, and of itself give to the defendants another privilege, right or exemption. It is, on the other hand, restrictive or explanatory merely of the affirmatively enacting part of the section, and limits its effect favorably to the defendants. So that the section and proviso together do no more than declare that when goods have arrived at the warehouse of the defendants in Detroit, they may charge storage upon them, after notice of their arrival and a lapse of twenty-four hours therefrom; but the availing themselves of this right so to charge shall not continue their liability as common carriers; but that, in all cases, where they have chosen to exercise this right, they shall be held only to the liability of warehousemen for goods thus awaiting delivery. In other words, the section was to apply only to goods which had reached their place of final destination and there awaited delivery, and not to goods on their way from the possession of the defendants to that of another connecting carrier. The judgment should be affirmed, with costs to the respondent.

All concurring, except PECKHAM, J., who sat in the court below, judgment affirmed.

## Statement of case.

ANNA BARRETT, Respondent, v. THE THIRD AVENUE RAILROAD COMPANY, Appellant.

The tracks of two horse railroad companies crossed each other at an acute angle; a car upon each track was approaching the intersection from opposite directions; and a collision occurred.—*Held*, that if the acts of the defendant's servants contributed to the injury, the defendant was liable, although the negligent acts of the persons in charge of the other car also were contributory.

The comparative degrees in the culpability of the two will not affect the liability of either. If both were negligent in a manner contributing to the result, they are liable jointly or severally.

The carrier of passengers has no right to experiment at the risk of those whom he carries. His duty is to exercise the utmost care and caution, and he is liable for slight neglect.

A party receiving an injury from the wrongful acts of others, is entitled to but one satisfaction, and an accord and satisfaction by, or a release or other discharge by the voluntary act of the party injured, of one, of two or more joint *tort feorsors*, is a discharge of all, but an attorney-at-law, as such merely, cannot settle a suit and give a release concluding his client in relation to the subject in litigation, although it is within his authority to discontinue the action.

Motions to set aside verdicts as contrary to evidence, as well as motions for a new trial upon the ground of newly discovered evidence, are not governed by any well defined rules, but depend in a great degree upon the particular circumstances of each case. They are addressed to the sound discretion of the court, and the exercise of this discretion is not reviewable in this court.

(Argued May 25th; decided June 6th, 1871.)

APPEAL from the judgment of the General Term of the Superior Court of the city of New York, reversing an order at Special Term setting aside a verdict in favor of the plaintiff for \$2,000 and granting a new trial.

Action by the plaintiff to recover for injuries sustained by her while riding as a passenger in a car of the defendants,

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| 45   | 628 |     |
| f164 | 210 |     |
| 45   | 628 |     |
| 173  | 462 |     |

## Statement of case.

resulting from a collision with a freight car of the Harlem Railroad Company, at a point where the defendant's road and that of the Harlem Railroad Company intersect and cross each other at an acute angle, in the city of New York. The car of the defendant was going in a southerly direction on a down grade, in a foggy evening, with the usual lights in each end of the car, and the Harlem car was going northerly, on an up grade, and without lights. The car was moving slowly; the defendant's car was moving more rapidly, but the evidence was conflicting as to the rate of speed. The defendant's car was, at the time of the collision, just passing off the southerly point at which the roads intersected each other, and the Harlem car was just approaching it from the north. The car of the defendant was broken up, and several of the passengers, including, the plaintiff, injured. Evidence was given by both parties as to the collision and its cause, and the acts and conduct of the managers of the two cars bearing upon the question of negligence. The defendant also gave evidence that the plaintiff commenced an action against both railroad corporations for the injury sustained, charging both with negligence; and that upon the receipt of \$100 by the plaintiff's attorneys from the Harlem Company, that suit was discontinued and this action brought.

This action was brought in the Superior Court of the city of New York, and, upon a trial by jury, a verdict was given for the plaintiff. On a motion at Special Term upon a case containing the evidence and exceptions to the charge of the judge, and to refusals to charge as requested, and upon affidavits of newly discovered evidence, a new trial was ordered on payment of costs. This order, on appeal to the General Term, was reversed, and judgment ordered for the plaintiff on the verdict, and from the judgment entered pursuant to such order this appeal is brought.

*Clarkson N. Potter*, for the appellant. Satisfaction as to one of two *tort feasons* is satisfaction as to both. (*Knickerbocker v. Hawes*, 8 Cow., 111; *Livingston v. Bishop*, 1 John.,

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290; *Brown v. Kinchelse*, 3 Cold., 192; *Merchants' Bank v. Curtis*, 37 Barb., 317; *Ruhle v. Turner*, 2 H. & N., 38; Bacon's Abridg., Tit. Release, 625; *Robertson v. Smith*, 18 John., 481; *Pouting v. Watson*, 33 Eng. L. & E., 116; *Pearce v. Pearce*, 25 Barb., 243.)

*Elial F. Hall*, for the respondent. On the question of liability. (*Bowen v. Central R. R. Co.*, 18 N. Y., 410; *Deyo v. Central R. R. Co.*, 34 N. Y., 9; *Maverick v. Eighth Avenue R. R. Co.*, 36 N. Y., 381; Story on Bailments, § 601; *Ingalls v. Bills*, 9 Metc., 1; *Caldwell v. Murphy*, 1 Duer, 241.) On the question of compromise with the Harlem Company. (4 Abbott's Dig., 720; *De Jeng v. Bailey*, 9 Wend., 336; *Noke v. Ingham*, 1 Wilson, 90; *Parker v. Lawrence*, Hobart's R., Am. ed., 70; *Salmon v. Smith*, 1 Saunders' R., 207.) On the question of the right of the jury to reject evidence, in their belief false. (*Dunn v. The People*, 29 N. Y., 523; *Lee v. Chadsey*, 2 Keyes, 543.) The issue of negligence must be submitted to the jury. (*Wolfkiel v. Sixth Avenue R. R. Co.*, 38 N. Y., 49; *Ernst v. Hud. R. R. Co.*, 35 N. Y., 9, and 39 N. Y., 61.) It is no defence to this action that the negligence of the Harlem Company contributed to bring about the collision. (*Clark v. Eighth Avenue R. R. Co.*, 36 N. Y., 138; *Maverick v. Eighth Avenue R. R. Co.*, 36 N., 378; *Webster v. Hud. R. R. Co.*, 38 N. Y., 260.) On the question of a new trial for surprise. (*People v. Superior Court*, 10 Wend., 285; *Trisler v. Ekeholt*, 5 Rob., 609; *Bell v. Thompson*, 2 Chitty, 194; *Bun v. Hoyt*, 3 John., 255; 3 Gra. & W. on New Trials, 940, 941, 982, 983; *Stoddard v. L. I. R. R. Co.*, 5 Sandf., 180; *Lewis v. Blake*, 10 Bosw., 199; *Cothran v. Collins*, 29 How., 155; *Lawrence v. Ely*, 38 N. Y., 42.)

ALLEN, J. There was no question of contributory negligence on the part of the plaintiff; she was injured without fault on her part, and the question upon the merits was, whether the collision causing the injury was exclusively the result of the negligent or careless acts of the agents and servants of the defend-



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Opinion of the Court, per ALLEN, J.

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ant having the control and management of the car in which the plaintiff was a passenger, or of such negligence in connection with negligence on the part of those in charge of and controlling the movements of the colliding car on the Harlem road. If the acts of the defendant's servants contributed to the injury, the defendant must respond in damages to the plaintiff, although the negligent acts of the persons in charge of the other car also contributed to the same result, and the comparative degree in the culpability of the two will not affect the liability of either. If both were negligent in a manner and to a degree contributing to the result, they are liable jointly and severally. (*Webster v. Hudson River R. R. Co.*, 38 N. Y., 260.)

There was no motion for a nonsuit on the trial, or request to the judge to direct a verdict for the defendant for the want of any sufficient evidence to authorize a recovery by the plaintiff. It was assumed, as well by those representing the defence, as by the court, that there was sufficient evidence of negligence to carry the case to the jury. The question whether the defendant was in fault, or whether the collision was wholly attributable to the negligence of the Harlem company and its driver, does not arise upon any exception taken at the trial, but is sought to be raised by a review of the order of the court below, overruling a motion for a new trial, and directing a judgment upon the verdict for the plaintiff. The motion was upon a case containing the evidence, and upon affidavits of newly discovered evidence.

The court, at Special Term, granted the application upon terms, and gave the defendant a new trial on the payment of the costs of the trial and of opposing the motion. The order does not indicate upon which of the two grounds, newly discovered evidence, or that the verdict was against the weight of evidence, the relief was granted. The terms imposed as a condition of the order were proper in either case, and show that the order was made by the court in the exercise of a legal discretion as a favor, and not as a matter of right for error in law. This order was reviewed by the General Term,

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Opinion of the Court, per ALLEN, J.

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and judgment ordered pursuant to the verdict. The appeal from the judgment brings up for review the order refusing a new trial, as an order involving the merits and necessarily affecting the judgment, so far as the matters decided are reviewable here. Motions to set aside verdicts as contrary to evidence, as well as motions for a new trial upon the ground of newly discovered evidence, are not governed by any well defined rules, but depend in a great degree upon the peculiar circumstances of each case. They are addressed to the sound discretion of the court, and whether they should be granted or refused involves the inquiry whether substantial justice has been done, the court having in view solely the attainment of that end. (*Pres't, etc., of Brooklyn v. Patchin*, 8 W. R., 47; *Gray v. Bridge*, 11 Pick., 189.)

The exercise of this discretion is not reviewable on error. (*Moore v. Foster*, 10 B. Monr., 255; *Pelletreau v. Jackson*, 7 W. R., 471; *Pr. Chancellor in Pres't, etc., of Brooklyn v. Patchin*, *supra*; *Hoyt v. Thompson's Ex'rs*, 19 N. Y., 207.) The defendant, by not objecting to submitting the question of negligence to the jury, conceded that there was evidence tending to prove the fact of negligence, and consented to a decision of the question by that tribunal, and having taken his chance of a favorable verdict, cannot now be heard to allege that the verdict is without evidence, and, therefore, against law. The question of law, sought to be made here, should have been made on the trial. If there was no evidence of negligence, it was error to submit the question to the jury, and, upon timely objection, would have been the subject of an exception, reviewable in this court. But, by not taking the objection and exception at the trial, the defendant waived it, and it cannot be raised by a motion, addressed to the discretion of the court, to correct the error of the jury. But if there was any evidence of negligence, or from which negligence could have been inferred, it was the right of the plaintiff to have the issue submitted to the jury, and it would have been error to take it from them; and this court could not review the action of the jury, notwith-

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Opinion of the Court, per ALLEN, J.

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standing there might be room for a difference in opinion, and we should think the jury had erred. Errors of the jury in the determination of issues of facts upon trials by jury, as regulated by the Code of Procedure, are not cognizable here. There was a conflict of evidence upon the trial, and the witnesses, upon either side, being unimpeached, the jury had a discretion to believe or disbelieve either or any of them. The testimony of some of the witnesses, if believed, tended strongly to fix the charge of negligence and gross carelessness upon the persons in charge of the defendant's car.

The night was shown to be dark and foggy, and it was not easy to discern objects in the distance, and the evidence of at least one of the plaintiff's witnesses was, that the defendant's car, before reaching the point of intersection of the two roads, was proceeding on a down grade at an unusual speed; that just before the point of intersection was reached, the speed was greatly increased, and that, at the time of collision, the horses were on a full run; that the car approaching on the other road was seen by a person standing by the side of the driver, when 150 to 200 feet distant, and that the defendant's car could have been broken up and stopped while passing over less than thirty feet.

This evidence, unexplained and uncontradicted, with the other circumstances in the case, raised a fair question to be submitted to the jury, upon the alleged careless and reckless management of the defendant's car by the persons in charge, and whether the collision was attributable in whole or in part to those acts, and whether by a proper performance of their duty the collision might not have been avoided.

It is undoubtedly true that this evidence was greatly shaken and its force impaired by the testimony of other witnesses, but it was the province of the jury to determine where the truth lay, and although the evidence may be doubtful and such as we might, were we sitting as jurors, regard as unreliable, the verdict of the jury is conclusive here. There was no error in the charge of the judge, to the effect that the rate of speed of the defendant's car was an important element in con-

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Opinion of the Court, per ALLEN, J.

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sidering the question of negligence, and that if the car was driven at an unusual rate of speed and by reason of such rapid speed the collision occurred, the plaintiff was entitled to recover.

There was no fact bearing more directly upon the question of negligence than the rate of speed at which the car was being driven, and the rate of speed before and as the car was approaching the place of intersection of the two roads, as well as at the time of actual collision, was material and relevant.

The approach and the manner of approach of the defendant's car to the place of actual collision was a part of the *res gestæ*, and could not be excluded from the consideration of the jury. The instruction to the jury that, if the defendant's driver saw the large car in time to break up and avoid the collision, he was bound to do so, was clearly proper. He had no right at the peril of the persons and lives of the passengers to hazard the experiment of passing beyond the point of collision before the other car would arrive at that point. The carrier of passengers has no right to experiment at the risk of those whom he carries. His duty is to exercise the utmost care and caution, and he is liable for slight neglect and for the result of hazardous experiments.

The jury were told that, if the driver thought he could cross in safety, he had no right to make the attempt unless there was sufficient time and sufficient space for him to pass without collision, of which the jury were the judges. This was a declaration in substance, although not in words, that, if the attempt to cross under the circumstances would have been deemed safe by prudent and discreet men, situated as the driver was, the act of crossing was not careless or negligent.

The exceptions to the refusals to charge as requested upon the subject of negligence, were not pressed upon the argument of this appeal. The refusal to each request was to charge otherwise than had been charged. Upon comparing the requests with the charge, as spread out upon the record,

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Opinion of the Court, per ALLEN, J.

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it will be seen that the judge had charged in accordance with the several requests, and it was not error to decline to repeat the instructions, or to adopt the precise language of the defendant's counsel.

The defendant set up as a defence to the action, a settlement with and release of the Harlem Railroad Company for the injury complained of. The rule is, that a party receiving an injury from the wrongful acts of others, is entitled to but one satisfaction, and that an accord and satisfaction by, or a release or other discharge by the voluntary act of the party injured, of one, of two or more joint *tort feorsors*, is a discharge of all. (*Knickerbocker v. Colver and Hawes*, 8 Cow., 111; *Livingston v. Bishop*, 1 J. R., 290; *Ruble v. Turner*, 2 Hen. & Munf., 38; *Bronson v. Fitzhugh*, 1 Hill, 185.)

There was no evidence of a release of the Harlem company. The plaintiff commenced an action against both corporations for the injury, which was discontinued, after an answer by the present defendant, and before the other defendant in that action had answered. The evidence was that the attorney for the Harlem company paid the attorney for the plaintiff \$100 for the costs of the discontinuance, and the plaintiff's attorney paid the attorney of the present defendant his costs of that action. Twenty-five dollars were paid the plaintiff upon her calling upon her attorney and telling him that she was out of work and was in need, and, as she testifies, was given to her to help her. It does not appear that she knew the source from which the money came, or that she authorized her attorney to compromise and settle her claim against either company. There was no accord and satisfaction with or release by the plaintiff, and the authority of the attorney does not extend to a compromise or release. He may discontinue an action, because that relates to the conduct of the suit, and is within his retainer, and not to the cause of action. (*Gaillard v. Smart*, 6 Cow., 384.) An attorney cannot settle a suit and conclude the client in relation to the subject in litigation, without his consent. (*Shaw v. Kidder*, 2 How. Pr. R., 244; *Lewis v. Gamage*, 1 Pick., 347.)

The court was requested to charge the jury that, if they believed there had been a settlement with the Harlem Railroad Company for the injury claimed in this action, no matter how slight the consideration, this action could not be maintained. The request was proper in terms, and should have been complied with, if there was any evidence of such settlement.

The evidence only discloses an agreement to discontinue the action then pending, and the consideration paid was for that and nothing else, if the only witness who spoke upon the subject is to be credited, and without his evidence, there is no evidence of the payment of any money, or any agreement with the Harlem company. It was competent for the attorney, without the consent of his client, to discontinue the action and commence a new action against one of the defendants for the same cause, or he might have discontinued the action as against the Harlem company, and continued it against the other defendants. He might enter a *nolle prosequi* as to one of the defendants, and proceed against the others. (*Cloke v. Ingham*, 1 Wilson, 90.) In some of the earlier cases, a *nolle prosequi* was considered in the nature of a retraxit, operating as a release or discharge of the action, and an absolute bar to any future action for the same cause. (*Bedus v. Shuly*, Cro. Jac., 211; *Green v. Chancellor*, Croke El., 762; Bac. Ab. Release, G., citing *Parker v. Lawrence*, Hob., 70.) But, in later cases, this doctrine is negatived, and a *nolle prosequi* is held not to be in the nature of a retraxit or release, or a bar to a future action. (*Welsh v. Bishop*, Cro. Ch., 239; *Cooper v. Tiffen*, 3 T. R., 511; *Coux v. Sowther*, 1 Ld. Raymond, 597.) The law is now well settled that a *nolle prosequi* or nonsuit is no bar to an action for the same cause. There was no evidence that any compensation was paid or accepted for the injury. The money paid was upon another consideration, and not in satisfaction for the injury to the plaintiff, now complained of. There was no error in declining to submit the question to the jury, for the palpable reason that a verdict for the defendant upon the ground, that there

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had been an accord and satisfaction for the injury, would have been without evidence and against evidence. Upon the statement of the attorney, who alone gave evidence upon this branch of the case, there is nothing to bar a new action against the Harlem Company for the same injury, and if there was any agreement to release, or not to sue that company in the future, there is no evidence of such agreement, even if the attorney had authority to make an agreement of that character which should bind his client.

The judgment should be affirmed.

All concurring, except RAPALLO, J., not voting, judgment affirmed.

THE ERIE RAILWAY COMPANY, Respondent, v. JOSEPH H. RAMSEY, Appellant.

The proceeding to punish for a contempt is a special proceeding, and falls within subdivision 8 of section 11 of the Code, and the order made is a final order in a special proceeding affecting a substantial right. Such an order is reviewable in this court. It is proper to entitle the papers as in the original action.

However hastily or improvidently an injunction may be granted, it is not void; it is valid until it shall be annulled by the court granting it, or reversed on appeal, and until such time it is entitled to obedience. If it is disobeyed, the party can be punished for contempt.

A court of equity has power, by injunction, to restrain proceedings in another equitable action in the same court, and the Supreme Court, in one judicial district in this State, has jurisdiction in an action brought for that purpose, to restrain, by injunction, proceedings in another action pending in that court, in another district. This jurisdiction should not be exercised except in extreme cases.

An equitable action was commenced in the Supreme Court; while it was pending an injunction order was granted by that court in another district in an action brought for that purpose, restraining proceedings in the first action,—*Held*, that it was not void, but must be obeyed until set aside.

(Argued April 4th; decided June 6th, 1871.)

APPEAL from the order of the General Term of the Supreme Court, in the first judicial district, dismissing defend-

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| 143 | 269 |
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| 153 | 539 |

## Statement of case.

ant's appeal from the order adjudging plaintiff in contempt, and ordering a reference, and modifying another order appealed from fining the defendant for such contempt, by reducing the amount of a fine from \$5,325 to \$260.

This action was brought for the purpose of restraining the defendant Ramsey from further prosecuting a suit commenced by him against the Erie Railway Company, Jay Gould, James Fisk, Jr., *et al.*, in the Supreme Court in the sixth district. A temporary injunction was procured from Judge BARNARD, on the 25th of November, 1869, restraining defendant Ramsey, his agents, etc., "from proceeding any further in the action wherein Joseph H. Ramsey is plaintiff, and the Erie Railway Company, Jay Gould and others are defendants, and from commencing or permitting to be commenced, any other action of a similar nature against the Erie Railway Company."

This injunction order was served upon Mr. Ramsey on the 26th day of November, 1869. On the 17th day of December, 1869, the motion papers in this proceeding were served upon Mr. Ramsey, together with an order to show cause before Judge BARNARD, on the 20th December, why he should not be punished for a contempt in violating the injunction herein, "by proceeding further in the action brought by said Ramsey against the Erie Railway Company and others," or for other relief.

The papers upon which said order was founded consisted of,

*First.* The summons, complaint, affidavits and injunction order in this action. The allegations of this complaint are sufficiently stated in the opinion.

*Second.* An affidavit proving service of such papers on Mr. Ramsey on the 26th of November, 1869.

*Third.* An affidavit of Dudley Field, showing that he was served, on the 4th December, 1869, with the printed papers attached to his affidavit (Exhibit A), by a person who stated that he represented one of the plaintiff's attorneys in *Ramsey v. Gould et al.*

*Fourth.* The printed papers above alluded to (Exhibit A), being copies affidavits in *Ramsey v. Gould et al.*, showing



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efforts to serve Gould *et al.*, and a failure to effect such service, an order for a substituted service on Gould and Lane, two of the defendants, and an order to show cause, granted at a Special Term of the Supreme Court at Delhi, on the 2d December, why the several orders of suspension and injunction, theretofore granted by the court, should not be continued.

These were all the papers upon which the order to show cause why Mr. Ramsey should not be punished as for a contempt was founded.

On the service of such order, at Delhi, an affidavit was also served upon Mr. Ramsey, showing that he was present, and sitting beside his counsel, when a motion was made in his behalf, at Delhi, on the 17th of December, to vacate the stay of proceedings granted by Mr. Justice Balcom, and to continue and confirm the original orders of suspension and injunction, and a receiver granted in his suit against Gould and Fisk on the 23d of November, 1869.

The motion or order to show cause, after several postponements, finally came on to be heard in February, 1870, when, in opposition to the same, an affidavit of Mr. Ramsey was read, in which his purpose in bringing his action against the Erie Railway Company, Jay Gould *et al.*, was stated to have been to procure the suspension and removal of defendants, Gould *et al.*, from their position as directors of the Erie Railway Company, and for an accounting by them to the company for several millions of money alleged to have been squandered and misappropriated by the defendants, the money belonging to the Erie Railway Company.

The affidavit further showed that the sworn complaint in that action, and several affidavits, were presented to the Special Term of the Supreme Court in the sixth district, and after an examination of the same by the court, the orders of suspension and injunction were duly granted. The affidavit also showed that plaintiff was in communication with parties representing millions of the capital stock and bonds of the company, and that he had received from them assurances of co-operation and support in his attempt to bring Gould, Fisk

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*et al.* to an accounting and a removal from their office. It was also stated in the affidavit, that although Ramsey was enjoined in this action from taking any further steps in his suit against Gould *et al.*, they were under no such injunction, but could go on and take such proceeding as they might be advised therein, while he was prohibited from any proceeding in the action.

It was also stated, that immediately after the injunction order was served upon Mr. Ramsey in this action, he had a consultation with his counsel in regard to what course he should pursue; that, after an examination of the law, his counsel unanimously advised him that, in their opinion, the injunction order in this action was void, that the court had no jurisdiction to stay his proceedings in another action in the same court, and that the injunction might be disregarded; that he was informed by his counsel that the Supreme Court, at General Term, in the first district, Judge BARNARD forming part of the court, had decided such an injunction to be void, and that it might be disregarded; that he was subsequently informed that, when the motion to continue the injunction in this action came on for argument before Judge BARNARD, he had said that it was granted in the first instance upon the allegations in the complaint of a fraudulent appearance by attorney for the Erie Railway Company, in the suit against that company and Gould *et al.*, which alleged fraudulent appearance was fully explained on such argument; that in doing what he had done since the injunction order was served upon him, he had acted under the advice of his counsel, fully believing he had the right so to do, and that he had been guilty of no intentional disrespect to the court, or any member thereof, and of no intentional contempt of the court or its orders.

An affidavit was also read of one of Mr. Ramsey's attorneys, showing that, since the plaintiffs in this action had procured their injunction, they had themselves gone on in the other case, and taken steps to have Mr. Ramsey's complaint dismissed.

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The judge, upon the conclusion of the argument, granted an order adjudging Mr. Ramsey in contempt for a violation of the injunction order in this action, and referred it to a referee to ascertain the damages that plaintiffs had sustained by reason of such violation of the injunction. From that order Mr. Ramsey appealed to the General Term of the Supreme Court.

Under the order thus appealed from proceedings were continued before Willard Bartlett, the referee named in the order, and testimony was taken before him from time to time, and he reported to the court that the Erie Railway Company had sustained damage, by the defendant Ramsey's violation of the injunction order, to the amount of \$5,325, and the expenses of the referee.

Upon that report, the court, at Special Term, BARNARD, J., made an order again adjudging Mr. Ramsey in contempt, and fining him \$5,325, together with \$500, the costs and expenses of this proceeding, and committing him to the common jail of New York county until such fine and costs were paid. This order follows the referee's report. From that order, an appeal was also taken to the General Term.

Upon the hearing of the reference before the referee, it appeared that the injunction in this action was procured on the 25th November, 1869.

On the second of December, 1869, the attorneys for the defendants Gould, Fisk and The Erie Railway Company, in the case of Ramsey against them and others, procured from Judge Clerke a stay of proceedings in that case under the order appointing a receiver of the company upon a notice of motion to vacate that order returnable on the 14th of December.

The papers served on the defendant's attorneys in *Ramsey v. Erie*, on December 4th, 1869, were affidavits, and an order to show cause, and an order for a substituted service of the summons, complaint, injunction orders, etc., on Gould & Lane, ordering defendants to show cause December 10th, at

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Delhi, why the several orders granted by the court in *Ramsey v. Erie*, the 23d November, suspending the defendants, and enjoining them from acting, should not continue and remain in full force.

Evidence was admitted upon this reference, under objection, of the value of services performed by the counsel for The Erie Railway Company, subsequent to the granting of the order to show cause why Ramsey should not be punished for a contempt.

By far the greater portion of the damage reported by the referee was alleged to have been awarded for such services. The testimony taken was submitted to the court at Special Term for its information, and the order made from which an appeal was taken to the General Term of the Supreme Court.

The General Term, after argument, dismissed defendants' appeal from the first order adjudging him in contempt and ordering a reference, and modified the other order appealed from by reducing the amount of the fine from \$5,325 to \$260, and affirmed the order in other respects. From both the orders of General Term, defendant now appeals to this court.

*Lyman Tremain* and *R. W. Peckham, Jr.*, for the appellant. On the question of the right to appeal from the orders, *Sudlow v. Know* (7 Abb. N. S., 411); Code, § 11; *People v. N. Y. C. R. R. Co.* (29 N. Y., 418). The injunction order was void. (Hilliard on Injunctions, 250, 255; *Minturn v. Trust Co.*, 3 N. Y., 498; *Dyckman v. Kernochan*, 2 Paige, 26; Clark's Ch., 307, 310; 1 Hoff. Ch. Pr., 89; *Dederick v. Hoysradt*, 4 How., 350; *Hurst v. Trust Co.*, 8 How., 416; *Foot v. Sprague*, 12 How., 355; *Arndt v. Williams*, 16 How., 244; *Harmon v. Remsen*, 23 How., 174; *Winfield v. Bacon*, 24 Barb., 154; *Van Vleck v. Clark*, 38 Barb., 316; *Grant v. Laick*, 5 Sandf., 612; *Schell v. Erie R. R. Co.*, 51 Barb., 368; *Smith v. Trust Co.*, Clark's Ch., 307; *Lane v. Clark*, Clark's Ch., 309, 310.)

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*David Dudley Field* and *A. J. Parker*, for respondent, cited 1 Duer., 451, 512; 9 N. Y., 263; *People v. Sturtevant* (9 N. Y., 279); *Bandon v. Beecher* (3 Clark & Fin., 479); *Manaton v. Molesworth* (1 Eden., 25); *Ogilvie v. Herne* (13 Vesey, 563); *Archer v. Slater* (10 Sim., 624); *Atwood v. Banks* (2 Beav., 192); *Boulter v. Boulter* (2 Beav., 196n); *Warrington v. Wheatstone* (Jacob, 202); *Sieveling v. Behrens* (2 Myl. & Cr., 581); *Archer v. Slater* (10 Sim., 625); *Ins. Co. v. Thomas* (Law Rep. 3 Ch. App. 74).

FOLGER, J. The defendant, by an order of the Special Term, dated 15th February, 1870, was adjudged guilty of a contempt of court, and a reference was ordered to ascertain and report the plaintiff's damages thereby sustained. His appeal therefrom to the General Term was by an order dated 1st November, 1870, dismissed. The Special Term, by an order dated 25th May, 1870, again adjudged him guilty of the misconduct alleged, determined the plaintiff's damages at \$5,325, imposed a fine upon the defendant to that amount, and ordered that he be committed to the common jail until that fine and the costs and expenses of the proceedings be paid. On appeal from that order the General Term, by order dated 1st November, 1870, modified the order of the Special Term so as to reduce the fine, etc., to \$260, and in other respects affirmed the order. From these orders of the General Term the defendant appeals to this court.

The case of *Sudlow v. Knox*, decided in this court in 1869 (7 Abbott N. S., 411), is a sufficient authority that an appeal lies to this court from these orders. It was there held that though the papers were entitled, as they are now, in the original action, still the proceeding to punish for contempt was a special proceeding, and fell within subdivision 3 of section 11 of the Code of Procedure, and that the order made was a final order in a special proceeding affecting a substantial right, and was such an order as is reviewable by this court. The case cited was an appeal from the final order imposing the fine. But the prior order adjudging the party

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in contempt was also before the court, was questioned in the argument, and was reviewed and passed upon by the court. (See pages 415-417.)

In that case, the court examined and passed upon the question whether the mulcted party, on the facts presented, was as a matter of law in contempt.

So here, the question is, upon the facts presented, was the defendant guilty of a contempt?

It is not urged but that he did in fact, at least technically, disregard the order of injunction; and thus the consideration of the case is narrowed to the inquiry, did the learned justice who granted that order have *jurisdiction*? Had he the power to sit in judgment upon the facts presented to him by the verified complaint in this action and the affidavits accompanying it, and to adjudge whether they brought before him a case demanding the interposition of the provisional remedy of an injunction order? It must be borne in mind that it matters not whether he adjudged erroneously as to the necessity or propriety of his interposition, or whether the facts were weak or insufficient. If the allegations contained in the papers before him tended to make a case, which existing he had the power to enjoin, then he had the power to sit in judgment upon them, and to adjudge and determine as to their strength or their weakness; the power to decide upon the facts thus presented, whether, as a matter of equitable expediency, there ought or ought not an order of injunction to issue. For this is not a review of the propriety of an order of injunction, nor are we to decide whether such an order has been hastily, improvidently or wickedly granted. If the facts before him tended to make a case, which made, jurisdiction was conferred to grant an order or to refrain from granting one, then, when he decided to grant it, it was not void. It was valid, though it should on appeal be held irregular or improvident. It was entitled to obedience, and disobedience was contempt. (*The People v. Sturtevant*, 9 N. Y., 266.)

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This court has held, in *Fellows v. Heermans*, decided in December, 1870, that, by the Code of Procedure, the writ of injunction was abolished, that an order of injunction was substituted; that as a process in the action, and as a provisional remedy, such order must find its warrant in that statute, or it cannot stand. We are to look, then, to the Code, and to that alone, for the authority to sustain jurisdiction upon the particular facts presented in this case. If no authority is found there, then there was no jurisdiction. Section 219 of the Code, so far as it is here applicable, provides that, where it shall appear, by the complaint, that the plaintiff is entitled to the relief demanded, and such relief or any part thereof, consists in restraining the commission or continuance of some act, the commission or continuance of which, during the litigation, would produce injury to the plaintiff; a temporary injunction may be granted to restrain such act. There can be no doubt but that the complaint states facts, which tended to show that acts had been, and were about to be, committed and continued, which would produce injury to the plaintiff. These acts, according to the allegations, were not merely the regular and orderly incidents of an action to enforce rights. But they were acts charged to be fraudulent; they were acts charged to be of fraudulent collusion between the attorneys of the plaintiff and an attorney assuming without authority to appear, and appearing in the action for the defendant therein, and about, fraudulently and by collusion, to consent, by hasty stipulation, that one also charged to be colluding, be appointed receiver of the vast property of the defendant. It was these acts, according to the complaint, these fraudulent and collusive acts, which would produce great and irreparable injury. And the allegations of the complaint sufficiently show that the injury would have been such. The relief demanded was in part, that this attorney and this inchoate receiver, might be restrained. *Prima facie*, these allegations being taken as true, the Erie Railway Company was entitled to that relief. The litigation

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which the commencement of the action instituted, was to declare void these fraudulent and collusive proceedings.

The provisional remedy of a temporary injunction order was asked for and granted during the litigation which was to determine the truth or falsity of the allegations. Into their truth or falsity, we have no power to inquire. As to the regularity or irregularity of the pleading or any of the papers, whether the injunction order was erroneous or not, we may not decide. It does appear, however, on the papers presented, that the learned justice had the right to judge between the parties and upon the subject. There was that in them which gave him jurisdiction. There was that in them which tended to show a case within the provisions of the 219th section of the Code. This being so, the injunction order was valid, and should have been obeyed. It is conceded that Mr. Ramsey did not obey it, to the letter at least. He was, therefore, guilty of, at the least, a technical contempt.

In the elaborate points submitted to us by the learned counsel for the appellant, nothing is suggested contrary to this view. But the material point urged and most relied upon, is that a court cannot allow an injunction order in an action brought to restrain the prosecution of another action in the same court. This is probably the serious question in this case, and it is fairly presented for decision.

The papers upon which the injunction order was granted, showed, pending against the plaintiff named in them, an action on the equity side of the court, of which the learned justice was a member.

The complaint presented to him, prayed that the plaintiff in the action thus pending, and his attorneys, be restrained by injunction from proceeding any further in it; that another person be restrained from acting as receiver, and that the attorney who had appeared for the defendant therein, be restrained from acting as such without express authority from it. An injunction order to that effect was granted by him, as judge of the court, at chambers. But as the Code (section 218), provides that such order, "when made by a judge, may



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be enforced as the order of the court;" it was, substantially, the order of the court. And as the court is, though so many judges, but one tribunal, it did thereby, in an action freshly instituted before it, enjoin proceedings in another action then pending in it, and restrain the action of a party whose complaint it had but lately entertained and acted upon. So that the question raised is, may a court of equity, in such a case, restrain the party to an action pending in it, from proceeding with his suit?

No ground of the jurisdiction of a court of equity is better established than that upon which it stands, when it restrains proceedings in a court of law. Where a party plaintiff is making use of the jurisdiction at law contrary to equity and good conscience, and where a party defendant has a good defence to an action at law, which, by mistake, accident or fraud of the other party, he is prevented from making, equity will interpose and make the defence available, and the remedy effectual by injunction. (Willard Eq. Juris., 347.)

In this State, since the adoption of the system of practice now existing, the equitable jurisdiction of a court to restrain proceedings at law in another court can be but seldom invoked. For there are but few courts, and they inferior, which have only a common law jurisdiction. The courts of original jurisdiction are mostly possessed of both equitable and common-law powers, and they are moreover mostly of co-ordinate jurisdiction. So that it may have been well held that one court of equitable jurisdiction may not, as a usual procedure, restrain the proceedings in another court of equal powers. For one, as much as the other, has in most cases the means of doing exact justice to all the suitors before it, and may, as well as the other, afford to the suitor any remedy equitable or legal to which he is entitled, and in any proceeding consistent with its established rules and practice, though it would be too much to say that, in no case, can a court restrain the suitors in another court of co-ordinate powers. Thus the jurisdiction of a court of equity to interfere to prevent a multiplicity of suits, or to draw to one

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action cognate questions and interests sought to be litigated in many actions, is well established. But is it to be held that the exercise of this jurisdiction is thwarted when the numerous suits are divided among several courts of co-ordinate law and equity powers? The suit to bring to one judgment all the actions must be in one of the courts, and to make that suit effectual to the end sought, the power must be in that court to enjoin the parties to the suits in the co-ordinate courts from proceeding therein. An instance of the exercise of one branch of this power, sanctioned by this court, is found in the case of *N. Y. and N. Hav. R. R. Co. v. Schuyler* (17 N. Y., 592). Nor is it without other precedent, that a court of equity, by action instituted before it, may question the proceedings in another court of equity. Thus one court of equity has overhauled the decree of another court of equity for fraud, contrivance or covin in the obtaining of it. (*Bandon v. Beecher*, 3 Clark & Fin., 479; *Manaton v. Molesworth*, 1 Eden., 25.)

If it may entertain an action for that purpose, in which its decree, if favorable to the moving party, will have the effect to forever restrain the execution of the decree, the validity of which is brought in question; why may it not, pending the suit before it, restrain by temporary injunction the execution and enforcement of that decree? If it may thus restrain the proceedings in another court of equity to enforce the decree of that court, may it not restrain the proceedings in that court to obtain the decree? We speak of it not as a power usually to be exercised, but as one not beyond the jurisdiction of the court. The affirmative answer to this query is found in the fact that it has done so. (*Jackson v. Leaf*, 1 Jac. & W., 229-232; *Clarke v. Ormonde*, Jacobs, 546; *Earl of Newberry v. Wren*, 1 Vern., 220, and notes; 1st Am. fr. 3d Lond. ed.; *Vendall v. Harvey*, Nelson, 19-21; *Joanes v. Whitney*, Carey, 161; *Booth v. Leycester*, 3 Myl. & Cr., 459; *Beckford v. Kemble*, 1 Sim. & Stu., 7; *Crawford v. Fisher*, 10 Sim., 479; *Schuyler v. Pellissier*, 3 Edw. Ch., 191, 192; *Beauchamp v. Huntley*, Jacob, 546.)

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But this ground of equitable jurisdiction, viz., that to restrain proceedings in a court at law, is not removed when the same court is clothed with powers both at law and in equity. Granted, that since the conjunction in this State of law and equity powers in nearly all courts of original jurisdiction, one court may not, as a usual thing, interfere with the proceedings in another court co-ordinate in power. Yet the jurisdiction to restrain proceedings at law remains.

A court, upon its equity side, may enjoin its own suitors' proceeding upon its law side. This jurisdiction is preserved and may be exercised. The only question can be, as to the method in which it shall be done. Is the method this alone, that in the action on the law side of the court, the facts be set up by answer, and affirmative equitable relief being prayed for upon them, the action be transformed into an equitable one, and thus there be, though not formally, yet practically, an injunction upon the party plaintiff from enforcing his strict legal right, until there shall be a determination of the claim of the party defendants for equitable relief? In a case in which all parties and all interests necessary to a full and complete determination of the controversy, were or could be brought before the court in the original action in a proper attitude to each other, there could be had such a determination. (Code, § 274, sub. 2; *Dobson v. Pearce*, 12 N. Y., 156; *Despard v. Walbridge*, 15 N. Y., 374; *Chase v. Peck*, 21 N. Y., 581.)

But this is not always practicable. If it be said, as is said, that a court cannot restrain itself, the answer is that a court of equity never sought or claimed to restrain a court at law, but did enjoin the suitors in it. (Willard Eq. Juris., 347; Story Eq. Juris., §§ 875-899.)

If it be said that the court can act upon its suitors by way of restraint in the very action which they are then prosecuting before it, one answer is that all the persons to be restrained and affected by injunction, temporary and perpetual, may not be parties to that action, and so not in the power of the court. (Story Eq. Juris., § 891b.) And another answer is, that a

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party defendant may sometimes, for immediate or full remedy, need relief against as well a co-defendant in the original action as the plaintiff therein (1 Beav., 171), and that he cannot always have relief against the co-defendant, based upon the allegations of new matter in his own answer, inasmuch as the co-defendant may not in that action have opportunity of taking and contesting an issue upon those allegations, and the transaction out of which the equity arises may be of too complicated a nature to be investigated in a motion in the same court for summary relief. (Willard Eq. Juris., 351; *Decker v. Judson* [per DENIO, Ch. J.], 16 N. Y., 439-50; *Jones v. Grant*, 10 Paige, 348.) So that it may well be, that in an action pending in a court of both law and equity powers, the tribunal may not be able to mete out full justice to the parties litigant in the action pending before it, without entertaining a cross action, in which other facts shall be presented and other persons made parties, and in which last action, it may be needful that an injunction order issue, restraining the prosecution of the first. (See *Thursby v. Wills*, 1 Code Rep., 83.) And accordingly we find the circuit courts of the United States, on the equity side, entertaining a bill and awarding an injunction to restrain proceedings on the law side thereof. And it is held that this may be done before the commencement of the suit at law, pending such suit, or after its decision by the highest law tribunal. (*Parker v. Judges, etc.*, 12 Wheat., 561; *Dunlap v. Sisson*, 4 Mason, 349; *Humphrey v. Leggett*, 9 How. U. S., 297; *Nixdorff v. Smith*, 16 Peters, 132.)

And this difficulty in the way of giving full relief, may chance not only when the first action is one of law, but when it is an action in equity. It is true that it has been said in general terms by courts of chancery, that the court does not enjoin its own proceedings, and that an application to a court to restrain one of its suitors can scarcely be considered as seriously made. (*Medlock v. Cogburn*, 1 Rich. Chy., 477; *McReynolds v. Harshaw*, 2 Iredell Chy., 196.)

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The cases just cited do not assert that there is no jurisdiction to entertain a cross-action, and in it to grant an injunction upon the original action. They hold an injunction in such case irregular. They do not hold it void. In *Hall v. Fisher* (1 Barb. Chy., 55), an injunction restraining a party from instituting a proceeding in equity to compel an account and payment of profits, was pronounced clearly wrong, because the complainant in the injunction action had an equitable defence to such a proceeding. But it was not held void. *Smith v. Am. Life Ins. and Trust Co.* (Clarke, Chy. Rep., 307), and *Lane v. Clark* (Id., 309), do not hold that there is no jurisdiction to grant an injunction. They are to the effect that it is not, as a general rule, a proper mode of obtaining a stay of proceedings. It is true, however, that a court of equity has restrained and does restrain its own suitors. Drewry on Injunctions, 105, states it as well settled, that a court of equity will exercise jurisdiction to restrain other proceedings in the same court. So in Willard on Equity Jurisprudence, 350, 351, it is said: "As an injunction to restrain proceedings at law, is directed only to the parties, and assumes no superiority over the court in which the action is pending, but is granted solely on the ground that some equitable circumstances exist, which render the prosecution at law against conscience; there is no reason why an injunction should not be granted by the court in which the action is pending, if the court has jurisdiction both at law and in equity." It is to be observed, however, that the learned author cites no decision of a court of equity to sustain his declaration. It is, however, not uncommon for courts to stay the proceedings of suitors in actions pending before them. This is often done on affidavits or petition showing that injury will result to one party in an action, if the other party be permitted to proceed with the ordinary celerity allowed by the rules and practice of the court. But this is generally by the same court, in the same action, and for the purposes of that action. Yet they have, in instances, gone farther than this, and a court of law has stayed the proceed-

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ings of one party to an action pending before it, to the end that the other party might bring an action in a court of equity to obtain the relief to which it appeared that he was entitled.

Had the court of law in the case last cited been possessed of jurisdiction in equity also, it would have restrained one suitor from proceeding on the law side of the court, that his opponent might commence an action against him on the equity side. It did ground its order of stay upon affidavits presenting facts and allegations not before shown in the action of which a stay was given. And it gave the order, so that a new and restraining action might be begun and determined in a court of equity. Now had it also possessed equity powers, could it not at once have entertained an action by a complaint in equity and upon that, and affidavits in that action have granted its order enjoining the suit at law pending before it? It would have been but a step further so to do. Instead of by affidavits or petition in the action pending, it would have become possessed of the facts warranting relief by complaint and affidavits in the new action. Those facts would as well warrant the entertaining the cross-action and the issuing an injunction order in it, as the stay of proceedings in the original action, so that the cross-action might be brought in another court. And jurisdiction would have existed for the one method, as for the other. But there is not such lack of precedent and authority for the position that a court of equity will entertain a fresh action in it, and in that action enjoin the suitors in action then pending before it. An action of interpleader in equity is such a case, in which a bill is filed for the relief of one, against whom several claim by legal or equitable suit the same thing, debt or duty, but who has incurred no independent liability to either of them, and does not himself claim an interest in the matter. In *Warrington v. Wheatstone* (Jacob's Rep., 202), an injunction was granted to restrain parties to another action in the same court, and this though the objection was made that the same relief could be had in the original action where the par-

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ties were the same. And though the reasons given by the court may be peculiarly of force in that class of cases, still it is shown that, in a case demanding it, jurisdiction exists, and that an injunction may issue in one action in a court to affect the proceedings in an action already pending in the same court. (And see *Campbell v. Fisher*, *supra*; *Schuyler v. Pelissier*, *supra*; *Sieveling v. Behrens*, 2 Myl. & Craig, 581; *Prudential, etc., v. Thomas*, Law Rep., 3 Chy. App. [Eng.] January, 1868, p. 74.) And the chancellor, in *Richards v. Satter* (6 J. C. R., 445), says that the bill of interpleader is equally proper though the claim of one defendant be actionable at law and the other in equity. (And see *Morgan v. Marsack*, 2 Merivale, 107.) In *Cheeseborough v. Millard* (1 J. C. R., 409), the Court of Chancery, pending an action before it, entertained a cross-action seeking relief on the same subject-matter. We have above alluded to the jurisdiction of equity to draw to itself the determination of numerous actions, in which the rights of many were sought to be enforced in what was substantially the same subject-matter, and also to its jurisdiction to entertain an action to prevent a multiplicity of actions. In the exercise of this jurisdiction, it will enjoin proceedings in these actions, be they actions at law in another court or actions in equity pending before it. So, on a bill of review, it will enjoin the execution of a decree theretofore granted by itself. (*Basye v. Beard*, 12 B. Monr., 581.)

So, in an action for the marshalling of assets and securities. So (in a minor degree), it will compel a suitor to elect between a suit at law, or one in equity, and the first being chosen, will stay proceedings in the last, or dismiss the bill. So, on motion in an action, the court will restrain a solicitor from acting for one party in that action, or in any other action between the same parties in respect to the same matter. (*Cholmondeley v. Clinton*, 19 Vesey, Jr., 261; and see *Briggs v. Head*, Sau. & Sen., 335; *Beer v. Ward*, Jacobs, 77.)

We may not say, then, much as we may deprecate the exercise of the power, unless in extreme cases, and where the most serious consequences would result from a refusal; we

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may not say then, as a general unlimited proposition, that a court of equity has not in any case jurisdiction to entertain an action for relief, and upon the papers therein, grant an injunction restraining the proceedings in a prior action for equitable relief then pending before it.

There was abstract jurisdiction then, in the learned justice, who granted the injunction order, to entertain the question, and to decide, whether upon the complaint and affidavits in this action, an injunction order should be granted, or be refused. Having that jurisdiction, that power of decision, when the order was granted, it was to be respected as the legitimate and valid order of the court, so long as it was not set aside by the court itself, or upon appeal. The defendant not having obeyed it, but having taken a proceeding in the action, proceedings in which were enjoined, he was in contempt. But it is evident to us, that this contempt was not headstrong. He was advised by counsel, that the order was void, and might be disregarded. And though the advice of counsel will not excuse a disregard of an order, so far as the rights of a party have been affected (*Hanley v. Bennett*, 4 Paige, 163), we cannot but perceive, that both counsel and client had reason for faith that the advice was sound. It had been declared in an opinion from the General Term of the district in which this order of injunction was granted, and in a case in which the plaintiff in this action was a litigant, that an order of injunction made by a judge in an action pending in the Supreme Court in one district, restraining an action pending in that court in another district, was absolutely void and might be disregarded. (*Schell v. Erie Railway Company*, 51 Barb., 368.) As this stood unreversed, counsel and client might easily conceive that they could take it as a guide to their conduct, and though it does not justify, it does palliate.

Courts are authorized to take such facts into consideration, in determining the extent of punishment, which is to be awarded against a defendant for a breach of the injunction order. (*Sullivan v. Judah*, 4 Paige, 447; and see 1 Meri-



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vale, 3.) But the least that a court can do in such a case, is to require the derelict party to pay to his adversary the costs of the proceedings against him for contempt. (Id.) If an actual loss or injury shall have been produced to any party, by the misconduct alleged, a fine shall be imposed sufficient to indemnify such party, and to satisfy his costs and expenses. (2 R. S., 538, § 21.) In all other cases the fine shall not exceed \$250, over and above the costs and expenses of the proceedings. (Id., § 22.) We do not perceive from the papers, that the plaintiffs suffered any great actual loss or injury within the purview of section 21 of the statute. There seem to have been many motions, and counter-motions, in the initiation of which the plaintiffs were quite as energetic as the defendant.

The punishment of the defendant will be quite severe enough, if it be limited to that imposed by the General Term.

The order of the General Term should be affirmed, but under the circumstances of the case, without costs of this appeal in this court to either party as against the other.

All concurring except ALLEN and RAPALLO, JJ., not voting, and PECKHAM, J., who did not sit. Order affirmed.

LUTHER H. CONKLIN, et al., Respondents, v. THE SECOND  
NATIONAL BANK OF OSWEGO, Appellant.

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The certificate of stock in a national bank contained a provision that the stock was not transferable until all the liabilities of the stockholder to the bank were paid.—*Held*, that such an agreement gave the bank no lien upon the stock for subsequent indebtedness of the stockholder, and was void as prohibited by the act of Congress (act of 1864, 13 U. S. Statutes, 99). The bank could only acquire an interest in its stock by a purchase, to prevent a loss upon a debt previously contracted in good faith.—*Held*, also, that a debt due from the stockholder, arising from collections made by him for the bank, was a "loan" within the meaning of the act.

(Argued April 14th; decided June 6th, 1871.)

## Statement of case.

APPEAL from the judgment of the late General Term of the Supreme Court in the fifth judicial district, affirming a judgment in favor of the plaintiffs.

The Second National Bank of Oswego was incorporated under the national currency act, approved February 25th, 1863; their articles of association were dated January 15th, 1864, and their by-laws adopted March 22d, 1864. The certificates of stock issued to the plaintiffs' assignor stated in the body of the certificate: "This stock is not transferable until all liabilities of the stockholder to this bank are paid." This was a transcript of one of the by-laws of the institution. Mr. Chandler, the plaintiffs' assignor, was a stockholder in the bank; he was also a private banker at Mexico, in this State. In May, 1867, he made a general assignment to the plaintiffs for the benefit of his creditors. Under this assignment, the plaintiffs claim the stock in question. Chandler acted as the correspondent of the bank in his vicinity, in making collections, and they also made collections for him. Each also paid to the holders checks drawn on the other. The accounts arising from these mutual transactions were settled from time to time; no interest was allowed by either party to the other. At the time of the assignment, the balance due from him to the bank for moneys collected for them was about \$4,000. For this they claim a lien upon the stock in question.

*John C. Churchill*, for the appellants. On the question of the validity of the by-law. (*Child v. Hudson's Bay Co.*, 2 P. Williams, 207; *Union Bk. v. Laird*, 2 Wheat., 390; *McDowell v. Bk. of Will.*, 1 Har. (Del.), 27; *Walsh's Assignees v. Bk. of N. A.*, 8 S. & R., 73; *Cunningham v. Ala. L. Ins. Co.*, 4 Ala., 652; *Angell on Corp.*, 5 ed., § 355; 1 Geo., 43; 26 Conn., 144; 9 Missouri, 149.)

*Amasa J. Parker*, for the respondents. This court cannot look into the evidence to see whether other facts than those found by the judge may not be discovered. (*Mosher v.*

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Opinion of the Court, per GROVER, J.

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*Hotchkiss*, 3 Keyes, 161; *Farnam v. Hotchkiss*, 2 Keyes, 9; *Marco v. Liverpool Co.*, 35 N. Y., 664; *Colwell v. Lawrence*, 38 N. Y., 71; *Mason v. Lord*, 40 N. Y., 477; Code, §§ 267, 268, 272.) The by-law was void. (*Leggett v. Bk. of Sing Sing*, 24 N. Y., 283; *Bk. of Attica v. Manufacturers' Bk.*, 20 N. Y., 501; *In re Long Island Co.*, 19 Wend., 37.) The money advanced by the bank was a loan. (*Marine Bk. v. Fulton Bk.*, 9 Wallace, 252; *Tinkham v. Heyworth*, 31 Ill., 319; Morse on Banking, 19, 322; Bouvier's Law Dictionary, title, "Loan."

GROVER, J. The defendant, as appears by the case, was incorporated under the national currency act of 1863. Section 25 of that act provides that the banks shall have a lien upon the stock of each stockholder for all debts and liabilities from him to the bank unpaid, and no transfer of the stock of the bank shall be valid until all debts and liabilities of the stockholder making the transfer are paid, and this provision shall be inserted in substance in the certificates of stock issued by the bank. Section 21 provides that certificates of stock signed by the president and cashier may be issued to stockholders, and the certificates shall state on the face thereof that the stock is transferable only upon the books of the bank, and that when the stock is transferred, the certificate thereof shall be returned to the bank and canceled and new certificates issued. The certificates for stock issued by the defendant to the plaintiff's assignor, pursuant to the requirement of the twenty-fifth section, expressed on their face that the stock was not transferable until all liabilities of the stockholders to the bank were paid. It is entirely clear that, by the currency act of 1863, a lien was given, to all banks organized under it, upon the stock of each stockholder for all debts and liabilities to the banks. This lien did not arise from any by-law of the banks, but was given expressly by the statute authorizing the incorporation of this class of institutions. But the act of 1863 was repealed by the sixty-second section of the currency act of 1864, passed June 3d of that year. (13 U. S. Statutes at Large, 99.)

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That section provides that the act entitled an act to provide a national currency, etc., approved February 25th, 1863, is hereby repealed; provided that such repeal shall not affect any appointments made, acts done, or proceedings had, or the organization, acts or proceedings of any association organized or in the process of organization under the act aforesaid, and provided also that all such associations, organized or in process of organization, shall enjoy all the rights and privileges granted, and be subject to all the duties, liabilities and restrictions imposed by this act, and provided, further, that the circulation issued or to be issued by such association shall be considered as a part of the circulation provided for in this act. The intention of this section was to continue in existence all banks organized under the act of 1863, with the same powers and privileges, and subject to all the restrictions conferred and imposed upon these thereafter organized under the act of 1864. The provisions giving a lien to a bank upon the stock of its stockholders for any debt or liability of a stockholder to the banks and for expressing such liability upon the face of the certificates issued to holders of stock contained in the act of 1863, were not re-enacted by the act of 1864. The defendant cannot, therefore, sustain the lien claimed upon the act of congress under which it is incorporated. Were there no restrictions imposed by the act of 1864, upon banks acquiring liens upon its stocks for the debts and liabilities of its stockholders to it, the only question in the case would be, whether a lien in its favor was created by the by-law enacted by its directors, declaring that its stock should be subject to such lien. But the act of 1864 does impose restrictions upon banks in this respect. Section 35, 13th U. S. Statutes at Large, 110, provides that no association shall make any loan, or discount on the security of the shares of its own capital stock, nor be the purchaser or holder of any such shares, unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith, and stocks so purchased or acquired shall, within six months from the time of its purchase, be sold

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Opinion of the Court, per GROVER, J.

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or disposed of at public or private sale, in default of which a receiver may be appointed to close up the business of the association according to the provisions of the act. It was held by the United States Supreme Court in *The First National Bank of South Bend*, plaintiff in error, v. *Lanier and al.*, defendants in error, that a pledge of his stock to the bank as a security for such money as the bank might deposit with a banking firm of which the stockholder was a member, was prohibited by the above section, and therefore void. Justice DAVIS in giving the opinion of the court says: These institutions were created to subserve public purposes, and not the mere private interests of their stockholders, and in no better way could this object be attained, than by placing shareholders in their pecuniary dealings with the bank on the same footing with other customers. Besides, how could the capital of the bank be kept available for active use, if the shareholder, who had pledged his stock for borrowed money, should be unable to meet his obligation. To the extent of the debt, the capital would be withdrawn, and it is hardly possible that this could be the case for any length of time were the debt secured outside of the stock. The learned justice answers the argument of the plaintiff's counsel: That deposits are neither loans or discounts, and comes to the conclusion that they are loans within both the letter and spirit of the section, whether interest was agreed to be paid thereon or not. The question in the present case is not, upon principle, distinguishable from *The Bank of South Bend v. Lanier*. In the present case the plaintiff's assignor, who was a private banker, and the defendant, were the agents of each other for the collection of paper belonging to one against parties in the vicinity of the other, and for paying checks drawn upon the other presented by holders thereof. The course of business was that each credited the other in account for the money collected upon paper sent for collection, and charged such checks drawn upon the other as were paid. These accounts were, from time to time, settled, and any balance due paid by the debtor

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Statement of case.

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party. The money collected upon paper remitted for that purpose, when credited in account by a banker, with the consent of the party owning the paper, becomes, to all intents and purposes, a deposit, and comes directly within the rule settled in *The Bank v. Lanier*. Besides, the construction put upon the section in that case, and the reasons assigned therefore, lead necessarily to the conclusion that all agreements by a stockholder, providing that the bank shall have a lien upon his stock for any liability thereafter created by him to the bank, are within section 35 of the act, and void. That the bank can only acquire an interest in its stock by an absolute purchase, to prevent a loss upon a debt previously contracted in good faith. When the statute has prohibited all express agreements between a bank and its stockholders for a lien in favor of the former upon the stock of the latter, to secure any debts or liabilities of the stockholders to the bank, that no such lien can be created by a mere by-law of the bank is too clear to require discussion.

The judgment appealed from must be affirmed, with costs.

All agreeing except PECKHAM, J., who does not vote.

Judgment affirmed.

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STEPHEN M. GORTON, Respondent, v. THE ERIE RAILWAY COMPANY, Appellant.

It is the clear duty of a person as he comes near to and upon a railroad crossing, to use all proper precautions to avoid injury, and the least he can do is to look in both directions. If he does not do so, and this omission contributes to his injury, he is guilty of such negligence as will bar his recovery, notwithstanding the negligence of those in charge of the train in omitting to sound the whistle or ring the bell.

(Argued May 29th; decided June 6th, 1871.)

APPEAL from the judgment of the late General Term of the Supreme Court, in the fifth judicial district, affirming the judgment of the Circuit in favor of the plaintiff.

## Statement of case.

This action was brought to recover for personal injuries sustained by the plaintiff, as well as injuries to his property, by reason of having been struck down by one of the defendant's locomotives while he was attempting to cross the defendant's railroad in the town of Corning, Steuben county. The plaintiff was familiar with the crossing, and knew that a train was liable to pass at that time. The plaintiff, although the view was uninterrupted for a long distance, did not look up and down the track; had he done so, he might have avoided the accident. Evidence was given showing that no bell was rung, nor whistle sounded as the train approached the crossing. The material evidence is stated in the opinion.

*G. M. Diven*, for the appellant. On the question of negligence, *Ernst v. H. R. R. Co.* (39 N. Y., 47, 68); *Beisiegel v. N. Y. C. R. R. Co.* (34 N. Y., 625); *Havens v. Erie R. R. Co.* (41 N. Y., 298, 299). On the question of intoxication, *Ernst v. H. R. R. R. Co.* (34 How., 110); 35 N. Y., 21; *Button v. H. R. R. R. Co.* (18 N. Y., 248); *Ager v. City of Lowell* (3 Allen, 402, 406); S. & R. on Negligence, §§ 45, 417, note 1.

*Brown & Graves*, for the respondent. The finding of the jury upon questions of fact is conclusive. (14 N. Y., 310; 13 N. Y., 533; 36 How., 84.) Former declarations must not only relate to the issue, but must be matters of fact, and not merely a former opinion of the witness. (*Holmes v. Anderson*, 18 Barb., 420; *Eltin v. Larkins*, 5 Carr. & Payne, 385; 1 Cow. & Hill's Notes, 727, 772; 1 Green. Ev., 586; *Teall v. Borden*, 40 Barb., 137.) The question of negligence is one for the jury, where there is any conflict of testimony upon that point. (39 N. Y., 68; 37 N. Y., 287; 36 N. Y., 132; 35 N. Y., 10; 13 N. Y., 533; 26 How., 177; 23 How., 168; 36 How., 84; 30 How., 219; 40 Barb., 193; *Starker's Ev.*, 2d vol., 973.) On the question of intoxication, *Stark. Ev.*, 3d vol., 496; *Hart v. Newland* (3 Hawks., 122, 123); *United States v. Jones* (1 Wash. C. C. R., 372); *Haley v. Earle* (30

## Opinion of the Court, per ALLEN, J.

N. Y., 208); Green. on Ev., 70, § 52; 584, § 448; Phil. & Am. on Ev., 909, 910; 1 E. D. Smith, 271. On the question of the rate of speed, *Hosley v. Black* (28 N. Y., 438); 26 How., 97; 1 E. D. Smith, 271; *Kelsey v. Barney* (12 N. Y., 425); *Johnson v. Hudson R. R. Co.* (20 N. Y., 66); affirming S. C. in 6 Duer, 633, and disapproving, *Brand v. S. & T. R. R. Co.* (8 Barb., 368); *Ernst v. H. R. R. Co.* (39 N. Y., 67); *Harty v. C. R. R. Co.* (42 N. Y., 472).

ALLEN, J. At the close of the evidence on the part of the plaintiff, the defendant moved that the plaintiff be nonsuited, upon the ground that he was shown to have been negligent, in approaching as well as in crossing the railroad track; that is, that the plaintiff was not wholly without fault, but that the injury was in part attributable to his own negligence and want of care.

Evidence had been given tending very strongly to show, that as the train of cars approached the road crossing, the bell upon the locomotive was not rung or the whistle sounded, as required by statute, and that no signal of the approaching train was given by the persons in charge. In the absence of proof of any negligence or other fault on the part of the plaintiff contributing to the injury, this would have authorized a verdict for the plaintiff.

The omission to ring the bell, or sound the whistle, or give other signal, to warn persons who might be upon the highway, in the vicinity of the intersection of the railroad track with the public traveled road, of the approach of the train, was, *per se*, negligent, subjecting the defendant to liability for all damages that might accrue to any one by reason of such omission.

The highway crossed the railroad at an acute angle, and the plaintiff was moving along the road and across the railroad in a south-easterly direction, approaching the railroad from the north-west, and the colliding train of cars approached from the west, on the southernmost of the two railroad tracks. The course of the railroad at that point was in a direct line both



east and west, and the plaintiff testified that when he got on to the track there was nothing to prevent him from looking both east and west; that is, that there was nothing, as he approached and reached the railroad track, to intercept or obstruct his view, or prevent his seeing the approaching train had he looked in that direction; that the space between the two tracks was three or four feet; that when he drove up to the rail (that is, to the north rail) he made no effort to look west to see whether a train was coming; that he did not try to look west at that time. Another of the witnesses testified that some years before he had come direct to the track when a train of cars going east had passed, and that he supposed he could have seen a mile up the road, if he had looked, but he was not paying attention and came near being caught.

Dr. Graves, the attending physician, and a witness for the plaintiff, had just crossed the railroad from the south, and was sitting in his wagon by the roadside, some twelve or fifteen rods north-westerly from the railroad crossing, when plaintiff passed him going toward the crossing. He had seen the coming train as he approached the railroad from the south, and he saw it as he was crossing the railroad, and it was then just going into or coming out of a bridge some distance from the road crossing. There was no doubt, upon the evidence given by the plaintiff and his witnesses, that had he looked to the west, as he drew near the railroad, he could have seen the train of cars approaching from the west and avoided the collision. There was no proof of, or attempt to prove any obstruction or hindrance to the view westward along the line of the road, or that a train of cars coming from that direction was not in plain sight for a long distance. Dr. Graves, and a Mr. Goff, with whom the doctor was conversing, when the plaintiff passed them on the road, saw the train from their position on the road before it reached the crossing, and testified that it was in sight from Rowley's crossing, which is some distance west of the crossing at which the plaintiff received the injury complained of. Mr. Goff, who lives at that place, testified, that a person near to the western bound

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(that is the northern) track, could see the track westward to the culvert bridge; that he could see up a mile and a quarter, he thought, and no trouble about it. It was the clear duty of the plaintiff as he came near to, and upon the railroad track, to use all proper precautions to avoid injury, and the least that he could do was to look in both directions.

It is not imposing an onerous duty upon the traveler crossing a railroad in broad daylight, over which trains of cars were frequently passing, and are liable to pass at any time, to make use of the most common and lowest degree of observation and care, and to cast his eyes in both directions, and in every direction, from which danger may be apprehended. He may not shut his eyes and stop his ears, and rush on regardless of the peril, and hold the railroad company as the insurer of his life, not only against the acts of its servants, but against his own suicidal negligence. The doctrine has been declared by this court, and reaffirmed, that a traveler approaching a railroad track is bound to use his eyes and ears so far as there is an opportunity, and when, by the use of those senses, danger may be avoided, notwithstanding the neglect of the railroad servants to give signals, the omission of the plaintiff to use his senses and avoid the danger, is concurring negligence, entitling the defendant to a nonsuit. (*Ernst v. H. R. R. Co.*, 35 N. Y., 9; S. C., 39 N. Y., 61; *Beisiegel v. N. Y. C. R. R.* 34 N. Y., 625; *Havens v. Erie Railway Co.*, 41 N. Y., 296.) There was no conflicting evidence upon this point. There was a conflict as to the existence of objects obstructing the view of a train approaching from the west, at points on the highway, between the railroad and Goff's house, and up to within from two to four rods of the railroad, and the evidence upon that subject presented a fair question for the jury. But these obstacles, if they existed and hid from view the railroad and approaching trains to the extent claimed, did not relieve the plaintiff from the duty of looking for an eastward bound train at the first opportunity, but rather rendered a cautious approach to the crossing the more necessary. Upon the undisputed evidence,

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that if the plaintiff had looked to the west, as he approached and reached the north track of the railroad, he could have seen the approaching train, and that he did not look, he should have been nonsuited. This may be explained upon another trial, but upon this record, the judgment should be reversed and a new trial granted, costs to abide event.

All agree except RAPALLO, J., who was not present at the argument.

Judgment reversed.

GEORGE W. BEERS, Appellant, v. JOHN T. HENDRICKSON et al.,  
Respondents.

It is irregular to include in the judgment rendered upon an appeal the amount of the judgment of the court below, thus making it a judgment for the amount of that judgment and the costs of the appeal. Where, however, judgment is entered in that form, payment of the amount thereof would operate not only as a satisfaction of such judgment, but of the judgment below included therein.

The execution of an acknowledgment of satisfaction of a judgment, and acknowledging such execution as required by statute, is an act of equal deliberation and solemnity as the execution of an instrument under seal. It is equally effective as an evidence of payment of the judgment, as an instrument executed under seal, and will discharge the judgment, although the consideration therefore is less than the amount due on the judgment.

An attorney is not authorized by his retainer to satisfy a judgment without payment, and if he does so, the court will set such satisfaction aside, and although an attorney should hold the judgment by assignment, as security for debts due from his client, his satisfaction without payment is good only for the amount of his interest.

(Argued May 29th; decided June 6th, 1871.)

APPEAL from the judgment of the General Term of the Superior Court of the city of New York, affirming the judgment of the circuit in favor of defendant.

In June, 1858, the defendant recovered a judgment by default, in the Superior Court of the city of New York, against the plaintiff, for \$1,754.78. One O'Brien was the

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attorney of record for Hendrickson. In July of the same year, this judgment was assigned to Callaghan & Miller, who had been duly substituted as attorneys for Hendrickson. The assignment was absolute in form, and transferred the whole judgment, but, in fact, was a security for \$1,000 due Callaghan & Miller for services, and \$100 lent him by Callaghan. On the 13th of July, the default was opened on Beers' application, the judgment to stand as security, and the suit was referred. The referee decided against the plaintiff Beers, and a second judgment was entered in favor of defendant Hendrickson, against Beers for \$2,155.67. From this judgment, Beers appealed to the General Term without giving security; this judgment was affirmed, and a third judgment was entered against Beers for the full amount of the second judgment, with interest and costs of appeal, making \$2,259.15. Callaghan & Miller issued execution on the third judgment, which was returned wholly unsatisfied. The firm of Callaghan & Miller was dissolved, and about two years afterward Miller acknowledged a satisfaction piece of the third judgment, which was filed with the clerk of the court. This was in consideration of \$200 paid by the plaintiff to Miller, entirely without the knowledge or consent of either Callaghan or Hendrickson. Miller did not have the possession of the assignment, but stated to the plaintiff that he was the owner. In September, 1866, the first and second judgments being still on record, Beers caused satisfaction pieces of them to be presented to Callaghan, and requested him to execute them. This was refused. This action was against Hendrickson and Callaghan for a decree that these two judgments are paid, and that Callaghan be required to satisfy them of record, and for such other relief as the court may deem the plaintiff entitled to. Callaghan always retained possession of the assignment.

*Max Goepf*, for the appellant. As to merger of judgments, cited *Pierce v. Thomas* (4 E. D. Smith, 354); *Union Bk. v. Mott* (8 Bosw., 591); *Gilchrist v. Comfort* (26 How., 394); *Ford v. Whitridge* (9 Abb., 416); *Miller v. Lvs. Co.* (3 E.

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D. Smith, 184); *Beardsley S. Co. v. Foster* (34 How., 97); *Binsse v. Wood* (37 N. Y., 532); *Briggs v. Thompson* (20 John., 294); *Halsey v. Flint* (15 Abb., 371); *Eno v. Crooke* (6 How., 462); *De Agreda v. Mantel* (1 Abb., 130); *Anderson v. Nichols*, 4 Rob., 630.) That the original claim of Hendrickson merged in the first judgment, and the assignment to C. & M. vested in them the whole of the claim. (*Mallory v. Leach*, 14 Abb., 449, note; *S. C.*, 23 How., 507; *Goodrich v. Dunbar*, 17 Barb., 644; *Nichol v. Mason*, 21 Wend., 341; *Oakley v. Aspinwall*, 4 Comst., 519; *Besley v. Palmer*, 1 Hill, 482; *Suydam v. Barber*, 18 N. Y., 470; *Doughty v. Hope*, 3 Denio, 249; *Pearce v. Kearney*, 5 Hill, 82; *Claff v. Messerole*, 38 Barb., 665.) The assignment of a judgment transfers the debt as well as the security, the debt being merged in the judgment. (*Ellsworth v. Caldwell*, 18 Abb., 20; *Pattison v. Hull*, 9 Cow., 747; *De Grant v. Graham*, 1 N. Y. Leg. Obs., 75; *Thomas v. Hubbell*, 35 N. Y., 120; *Carnes v. Platt*, 40 N. Y., 181.) That one of two joint assignees represents both, and his acts are binding on both, he cited *Pierson v. Hooker* (3 Johns., 68); *Bulkley v. Dayton* (14 Johns., 387); *Bruen v. Maynard* (17 Johns., 58); *Jacomb v. Harwood* (2 Ves. Sr., 265); *Murray v. Blatchford* (1 Wend., 383); *Wells v. Evans* (20 Wend., 251); *People v. Keyser* (28 N. Y., 226); *Bowes v. Seger* (8 W. & S., 222); *Ruddack's Case* (6 Co., 25); *Austin v. Hall* (13 Johns., 286; *Fitch v. Forman* (14 Johns., 172); *Betzhofer v. Stockton* (4 Cr. C. 695). He also cited numerous cases as to the effect of the satisfaction for a less sum in extinguishing the claim.

*J. S. Bosworth*, for the respondents. On the question of the satisfaction of a judgment by a less sum than the full amount, *Harison v. Close* (2 John., 448); *Seymour v. Min-turn* (17 John., 169); *Lynch v. Welch* (Seld. Notes, 13); *Ward v. Browhead* (14 L. & Eq., 502); *Crafts v. Wilkinson* (4 Ad. & Ellis, N. S., 74); *Bleakley v. White* (4 Paige, 654); *Lewis v. Woodruff* (15 How., 539); *Carrington v. Crocker* (37 N. Y., 338, 340); *Moss v. Shannon* (1 Hilt., 175). On

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the question of Miller's want of authority to act, *Green v. Miller* (6 John., 39); *Sinclair v. Jackson* (8 Cow., 543); *Downing v. Ruger* (21 Wend., 178); *People v. Williams* (36 N. Y., 441); *McGregor v. Comstock* (28 N. Y., 237). He also cited *Young v. Bushnell* (8 Bosw., 14, 20); *Blake v. Tucker* (12 Vt., 44); *Lounds v. Remsen* (7 Wend., 35); *King v. Harris* (34 N. Y., 330); *Wolcott v. Holcomb* (31 N. Y., 135); *Ward v. Dewey* (16 N. Y., 522); *Swan v. Saddlemire* (8 Wend., 676, 681).

GROVER, J. It was irregular to include, in the judgment of affirmance given upon the appeal, the amount of the judgment of the court below, thus making it a judgment for the amount of that judgment and the costs of the appeal. (*Eno v. Crooke*, 6 How. Pr., 462; *De Agreda v. Mantel*, 1 Abb. Pr., 130; *Halsey v. Flint*, 15 id., 367.) But the plaintiff in the action having entered the judgment in that form, there can be no doubt but that payment of the amount thereof would operate not only as a satisfaction of such judgment, but of the judgment below included therein. It follows that, if the acknowledgment of satisfaction executed and acknowledged by Miller and delivered to the plaintiff's attorney, was a valid discharge of the judgment entered upon the affirmance, he was entitled to judgment in this action requiring the defendants to cancel of record the judgment appealed from, and also the judgment that was ordered to stand as security upon setting aside the inquest and directing a reference of the action for trial, in which proceeding the judgment appealed from was recovered. The assignment by Hendrickson, the plaintiff, of the first judgment recovered to Callaghan & Miller included the claim upon which it was recovered, and which merged in the judgment, so that when the court ordered such judgment to stand as a security for any recovery that might be had in the trial ordered by the court, they had the like interest in the judgment recovered upon such trial, that they had in the judgment assigned to them. The question is, whether the acknowledgment of satisfaction

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by Miller operated as a discharge in whole or in part of the judgment entered upon the affirmance of the judgment recovered upon the trial upon the appeal therefrom. That judgment was upward of \$2,000. Miller, upon payment to him of \$200, acknowledged satisfaction of this judgment in the names of Callaghan & Miller, the attorneys for the plaintiff therein, and delivered the same to the defendant, or for his use to the clerk of the court, who canceled the docket of the judgment. This was not a valid discharge, if the only right of Miller to do the act was that of attorney in the case for the plaintiff. An attorney is not authorized by his retainer to satisfy a judgment without payment, and if he does so, the court will set such satisfaction aside. (*Lewis v. Woodruff*, 15 How. Pr., 539.) But it is claimed by the plaintiff that Callaghan & Miller were the owners of the judgment, and that although, as the attorney of the plaintiff, he could not satisfy it without payment, yet as owner he might, and that the discharge should be regarded as executed by him as owner as well as attorney. If Miller had been the absolute owner of the judgment, the position of the counsel would be correct. His undertaking, though as attorney, would be held binding upon him as owner and the judgment released. It is insisted by the counsel for the defendant that Miller having received \$200 only as a consideration for the discharge, it could only operate to extinguish that amount, conceding him to have been owner of the judgment. The counsel relies in support of this position upon the well settled rule that an agreement to receive a part of a debt already due, in satisfaction of the whole, and payment of such part is not valid as an accord and satisfaction of the debt, and constitutes no defence to an action for the recovery of the residue of the debt. This rule never was applied to a release or other discharge of the debt by an instrument under seal. This distinction arose from the fact that at common-law a seal was conclusive evidence of an adequate consideration for a contract. This rule was changed by section 77 (2 R. S., 407), which provides that the seal

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shall only be presumptive evidence of a sufficient consideration, which may be rebutted in the same manner and to the same extent as if such instrument were not sealed. Notwithstanding the abolition by statute of the common-law rule, upon which it was based, the distinction has been preserved; and it is still held that a release, under seal, from a debt, given upon payment of a part, constitutes a valid defence to an action for the residue. (*Carrington v. Crocker*, 37 N. Y., 336.) This must now be held to result from the greater deliberation and solemnity shown by using the seal in the execution. This was the reason why an inquiry into the consideration, where the contract was under seal, was not permitted by the common-law. But the execution of an acknowledgment of satisfaction of a judgment, and acknowledging such execution, as required by statute, is an act of equal deliberation and solemnity as the execution of an instrument under seal. It may be entered upon the roll, and thus constitute moral evidence of the payment of the judgment. (*Lownds v. Remsen*, 7 Wend., 35.) It should, therefore, be held equally effectual as an instrument under seal. Had Miller been the owner of the judgment, his acknowledgment would have been a valid discharge of the entire amount, although less than one-tenth was in fact paid. But neither Miller nor Miller & Callaghan were such owners. The first judgment was assigned to Miller & Callaghan by Hendrickson, as security for what he owed them for attorney and counsel fees, amounting to \$1,000, and for money borrowed of Callaghan, amounting to \$100, leaving an interest in Hendrickson of more than \$1,200 in the judgment, had it been paid or collected. We have seen that the paper executed by Miller, in the names of the attorneys of Hendrickson, did not constitute a legal discharge of the judgment, unless he was the owner thereof. He was not such owner, in equity. He and Callaghan had dissolved partnership some time before his attempt to satisfy the judgment. The finding shows that this attempt of Miller was made in fraud of the rights of Hendrickson and Callaghan. This finding is not unsupported by the evidence. The plaintiff



## Statement of case.

did not pay the \$200 on the faith of the assignment, for the case shows that the assignment was delivered to Callaghan, who always retained the possession, Miller never having had the possession or it. True, Miller said he was the owner, but his declaration could not estop either Hendrickson or Callaghan. Had the plaintiff insisted upon the production of the evidence of his title, he would have learned the true state of the case. The equity of Hendrickson is superior to that of the plaintiff, and I think that of Callaghan is also. But the plaintiff was entitled to have the judgment satisfied to the extent of Miller's interest therein. That interest was \$500, and the plaintiff was entitled to a credit for that amount, instead of the \$200 paid to Miller. The counsel for the appellant insists that, as it appears there were three judgments entered against him for the same cause, he is entitled to a judgment for the satisfaction of two of them. He raised no such question in the court below, and there is no exception to any ruling thereon by the court. This court cannot, therefore, consider it.

The judgment must be modified by declaring that the plaintiff is entitled to have the three judgments satisfied, on paying what shall be due after deducting \$500, which was Miller's interest, and, as so modified, affirmed, without costs in this court to either party.

All agreeing. Judgment accordingly.

BENJAMIN BLISS, Appellant, v. MARY Y. C. GREELEY,  
Respondent.

A limited and specific grant of the right to dig and stone up a certain spring, and conduct the water therefrom through the grantor's land, by a specified pipe, to the grantee's house, with covenant of warranty, does not render the entire premises servient to the easement; and the grantor may lawfully sink another spring, but twenty-seven feet distant, although the effect is to render the first one useless.

(Argued May 24th; decided June 13th, 1871.)

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| 45  | 671 |
| 119 | 42  |
| 45  | 671 |
| 130 | 471 |
| 45  | 671 |
| 134 | 390 |
| 45  | 671 |
| 135 | 64  |

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Opinion of the Court, per PECKHAM, J.

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APPEAL from an order of the General Term of the Supreme Court in the second district, reversing judgment in favor of the plaintiff at Special Term, and dismissing the complaint with costs.

The facts sufficiently appear in the opinion of the court.

*Odle Close*, for the appellant, cited *Broom's Leg. Max.*, 362; Washb. on Real Prop., 2d vol., 622, 3; *Clark v. Est. of Conroe* (38 Vt., 469); *Balston v. Bensted* (1 Campb., 463); *Dexter v. Prov. Ag. Co.* (1 Story, 387); *Dickinson v. Grand Junc. Canal Co.* (7 Exch., 282); *Smith v. Adams* (6 Paige, 435); *Acton v. Blundell* (12 Mees. & W., 324); *Greenlief v. Francis* (18 Pick., 117); *Roath v. Driscoll* (20 Conn., 523); *Frazier v. Brown* (12 Ohio, 294).

*Robert S. Hart*, for the respondent, cited *Acton v. Blundell* (*supra*); *Chassemore v. Richards* (7 House Lords' Cas., 349); *Pixley v. Clark* (35 N. Y., 527); *Trust. of Delhi v. Youmans* (50 Barb., 319); *Dixon v. Clow* (24 Wend., 190); *Haldeman v. Burckhardt* (45 Penn. St., 519); *Palmer v. Wetmore* (2 Sandf., 318); *Meyers v. Gemmel* (10 Barb., 537).

PECKHAM, J. In 1849 one Haviland, in consideration of one dollar, granted to this plaintiff, by deed, and to his heirs and assigns forever the "right and use, to dig, stone up or box up a certain spring of water situated on the lands of said Haviland (describing its location);" also "to have the right, use and privilege of digging and laying a pipe through the property of Haviland for the purpose of leading the water from said spring to the house of said plaintiff;" also, he has the right to enter on the lands of Haviland to keep the pipe in repair. Haviland reserved to himself and his heirs the right of drawing water from said spring by a pipe or pipes inserted into said spring in such a manner as to leave two inches of water above the pipe of the plaintiff; also reserved the right to alter the course of the pipe of plaintiff at any time when necessary for the purpose of digging a cellar or other improve-

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ments, when the same can be done without injury to the plaintiff. Haviland covenanted to warrant and defend the plaintiff, etc., in the quiet enjoyment of said rights and privileges. Haviland subsequently conveyed his farm to the defendant, subject to the rights granted to the plaintiff. The plaintiff dug down and boxed up the spring, put in a pipe, and conducted the water to his house, some sixty rods from the spring, and used it till interrupted by the defendant.

In this state of things the defendant caused another spring to be dug upon her farm, some twenty-seven feet from the other, about four feet deep, the spring dug by the defendant being upon land between one and two feet higher than the land at the other spring; whereby, as the justice at Special Term found, the water in the plaintiff's spring has been reduced in quantity and deteriorated in quality, and has in fact been rendered nearly useless.

The simple question is, had the defendant the right to dig the new spring under these circumstances? The Special Term held she had not, and enjoined her from digging further. On appeal the General Term reversed this judgment, one judge dissenting.

It will be observed that the trial court has not found that this digging by defendant was done maliciously, for the mere purpose of injuring the plaintiff, nor can any inference of that kind be drawn or presumed from the findings, as the defendant offered to show on the trial the purpose for which she wanted this new spring, and the testimony was rejected on the plaintiff's objection.

In this case, the grant and the covenants of the grantor are the precise measure of the plaintiff's right. (God. on Ease'ts., 185, and cases there cited.)

For a small consideration, the owner of the farm granted to the plaintiff the right to dig out and box this spring and to put a pipe in it, of not over a certain size, and to enter on his land to keep the pipe in repair. He warranted these rights.

Did he thereby covenant that he would not use the rest of his farm in a farmer-like manner? That he would not

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improve it by buildings, by digging cellars, or otherwise, as his interests might require? Or if he built, that he should not dig a spring on another part of his farm to supply his buildings with water, if by so doing he should reduce the underground, percolating supply to the plaintiff's spring? I think not.

The deed to the plaintiff contains no covenant against doing any of these things; and, since the Revised Statutes, none can be implied. (1 R. S., 73, § 5, 140; id., 750, § 10.)

There is a reservation that the grantor may alter the course of the pipe for the purpose of digging a cellar, or other improvements, where the same can be done without injury to the grantee. This was a necessary reservation, otherwise the grantor would have had no authority to alter the course of the pipe for any improvement there. But this reservation was wholly unnecessary as to the rest of the farm.

Had the parties thought otherwise, is it not clear that provision would have been made in the deed for other improvements upon other parts of the farm, when the grantor was so careful as to the part actually occupied by the plaintiff's pipe? Did he intend to provide for improvements in that limited locality, and yet subject the whole residue of his farm entirely to the uses of this spring, unless ~~he~~ could dig and improve it in other places without impairing the supply to the spring? The intent of the parties should govern, if it can be found in the deed.

The conceded rule that a grant carries with it every incident necessary to make the grant effectual, does not aid the plaintiff. (Platt on Cov., 56-58, and cases there cited; 1 Saund. R., 321, and cases cited; *Whitehead v. Parks*, 2 H. & N., 870; *Northam v. Hurley*, 1 E. & B., 665; 22 L. J. Q. B., 183; *Hodgson v. Field*, 7 East, 613; *Henning v. Burnett*, 8 Exch., 187; 22 L. J., Exch., 79; *Williams v. James*, L. R., 2 C. P., 577; 36 L. J., C. P., 256; *Blatchford v. Mayor of Plymouth*, 3 Bing. N. C., 691; 6 L. J. N. S., C. P., 217.)

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*Whitehead v. Parks* is an instructive case, but I do not think it controls this. The grant there was much broader than here.

There is here no grant of any waters outside of that spring, under or above the earth. But the grantor reserved the right to reduce the spring by direct means to two inches above the plaintiff's pipe.

The grant, here, is limited and specific. It grants the right to dig and box up a spring, and to insert a pipe therein, and conduct it over the grantor's land. This did not make a servient estate of the grantor's whole farm. It is difficult to see how the plaintiff acquired more thereby than if he had obtained a grant in fee of the land, including the spring and the track of the pipe. Under a grant in fee it is quite clear that he could have no relief against the acts found in this case. (*Pixley v. Clark*, 35 N. Y., 527, and cases there cited; *Trustees of Delhi v. Youmans*, decided in this court (Ante p. 362); 2 Wash. on Real Prop., 3d ed., 325, and cases there cited.)

This grant prevents the grantor and his assigns from any substantial interference with the spring or the pipe. It does not prevent their improvement or use of the residue of the farm. Had the parties designed to make the whole farm servient to this easement, they should have expressed that purpose.

In the absence of such expression the grantor is permitted to use the residue of his farm, as any proprietor may his land.

A late author observes: "In such case, if the grantee be disturbed, he is disturbed by one exercising a natural right to which he is entitled; he is justified in his act, and the party disturbed can have sustained no legal injury." (God. on Easements, 223.)

But it does not clearly appear that the plaintiff cannot possibly recover upon any ground upon another trial. Therefore the Supreme Court should have granted a new trial instead of rendering judgment for defendant. For this reason the

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judgment is reversed and new trial granted, costs to abide event.

All concur, except RAPALLO, J., absent.

Judgment reversed and new trial granted. /

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| 45  | 676 |
| 119 | 219 |
| 45  | 676 |
| 120 | 189 |
| 45  | 676 |
| 133 | 325 |
| 45  | 676 |
| 187 | 177 |
| 45  | 676 |
| 144 | 498 |

SMITH H. NEWMAN, Appellant, v. THE BOARD OF SUPERVISORS  
OF LIVINGSTON COUNTY, Respondent.

Since the act of 1855 (Laws 1855, chap. 427), upon return by the town collector of a tax, laid upon real estate, uncollected for want of goods and chattels of which to make the same, the land is to be classed as non-resident, as to such unpaid tax, and all proceedings for the collection thereof must thereafter be had as if it was the land of a non-resident, pursuant to that act.

Where the board of supervisors assume to add the amount of a tax so returned to the assessment roll of residents, and thus charge it upon one who has succeeded to the occupation of the land assessed, their action is without jurisdiction and void, and the tax thus laid against him is illegal. If such illegal tax is collected and paid into the treasury of a county, an action as for money had and received will lie against the county for its recovery.

The money having come to the treasury of the county by the wrongful act and with the knowledge of its officers, no demand is necessary before suit, nor is it necessary to present the claim therefor to the board of supervisors for audit and allowance.

The action of a board of supervisors, in issuing a warrant for the collection of taxes, is not the act of the several members, as supervisors of the towns respectively, but the corporate act of the county.

(Argued June 1st; decided June 13th, 1871.)

APPEAL from a judgment in favor of the defendant, entered upon an order of the General Term of the Supreme Court, in the seventh district, on an appeal from an order of the Special Term, striking out an answer and sustaining a demurrer.

This action was brought to recover the amount of a "returned tax" illegally assessed by the board of supervisors of Livingston county, to the plaintiff, in the year 1867.

The complaint alleges, that in the year 1866, one James Forbes was the owner and occupant of the American hotel

## Statement of case.

premises, in the village of Lima, in the county of Livingston, and was in that year assessed a tax thereon of \$141.31.

That before the assessment roll and warrant for that year were delivered to the collector, Forbes had removed to Yates county, and the plaintiff had become the owner and occupant, and was in the actual occupancy of the premises during all the time the assessment roll and warrant were in the collector's hands, and until April, 1867, when the collector returned the tax unpaid, and "that he had not, upon diligent inquiry, been able to discover any goods or chattels belonging to, or in the possession of the person charged with or liable to pay such sum, whereon he could levy the same."

That in 1867, the board of supervisors, at their annual session, assessed to the plaintiff the "returned tax" of 1866, which, with the interest and fees thereon, amounting to \$144.84, was carried, with the plaintiff's tax on the same premises for the year 1867, into the fifth or last column of the assessment roll of the town of Lima, for the year 1867, as follows:

| Names of owners or possessors. | Remarks.                         | Value of real est. | Total real and personal est. | Tax to be p'd thereon. |
|--------------------------------|----------------------------------|--------------------|------------------------------|------------------------|
| Newman Smith..                 | Public House. Ret. tax, \$144.84 | \$5,000            | \$5,000                      | \$257.87               |

and delivered the same, with their warrant annexed, to the collector.

That the plaintiff paid the tax on said premises for the year 1867, and the collector, by levy and sale of the plaintiff's personal property, made the amount of the "returned tax" and fees of collection, amounting to \$151.08, and paid the same, less his fees, to the county treasurer.

The answer sets forth three separate defences, viz. :

1st. That the signing of the warrant was not the corporate act of the county of Livingston, but it was signed by the supervisors of the several towns of said county.

2d. That the defendant had no knowledge or information sufficient to form a belief as to whether the collector made the amount of the said "returned tax," and paid the same to

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the treasurer of Livingston county, and denying that the assessment was illegal and void, or the collection of the tax unlawful.

3d. That the claim had not been presented to, or demand made, either of the board of supervisors or of the county treasurer, and that the board of supervisors had never refused to audit said claim, nor had the county ever refused to pay the same.

The plaintiff moved to strike out the first answer as irrelevant or frivolous, the second as sham, and demurred to the third.

The special term granted the motion to strike out the first answer, denied the motion to strike out the second, and sustained the demurrer.

The General Term reversed the order striking out the first answer, affirmed the order refusing to strike out the second, reversed the order sustaining the demurrer, and ordered judgment for the defendant.

The case is reported in 1 Lansing, 476.

*E. A. Nash*, for the appellant, as to the distinction between *illegal* and *erroneous* assessments, cited *Mygatt v. Washburn* (15 N. Y., 316); *Barhyte v. Shepherd* (35 N. Y., 238). That the action lies, he cited *Chapman v. City of Brooklyn* (40 N. Y., 381); *Hill v. Supervisors Livingston Co.* (12 id., 52); *People v. Suprs. of Chenango Co.* (11 id., 567-569); *Howell v. City of Buffalo* (15 id., 512).

*Scott Lord*, for the respondent, as to the latter point, relied upon *Swift v. City of Roughkeepsie* (37 N. Y., 511).

FOLGER, J. The Revised Statutes and subsequent enactments provide ways for assessing, levying and collecting the State and other taxes upon lands. In doing so, they classify lands into two divisions: One those of residents, and the other those of non-residents. (1 R. S., p. 390, § 9; 391, § 11.) The assessment of 1866 of this public house and premises



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properly placed it in the first class, for the owner of it at that time was a resident. All the proceedings to assess and levy that tax seem to have been regular and valid. The attempt to collect, so far as the town collector was concerned, was regular and valid. (1 R. S., p. 399, § 10; Laws of 1855, 782, § 6.) When he failed to find goods and chattels, of which to make that tax, and made return of that fact to the county treasurer, the lands, so far as the questions in this case are involved, ceased to be liable as those of a resident. After that, all attempts to collect that tax must have been had against them as those of a non-resident. (Laws of 1855, chap. 427, §§ 4, 5.) For that purpose, the assessors of the town no longer had power or jurisdiction. The only officer who had power and jurisdiction to initiate new proceedings was the supervisor of the town. He had jurisdiction of the subject-matter, *i. e.*, the levying of the tax returned unpaid, and of the particular property, the public house and premises. He had no power or jurisdiction to make an assessment against any person, against the plaintiff, nor to charge or affect immediately the plaintiff or his property, other than this real estate. He could only proceed in the manner prescribed by the statute. To proceed in any other manner was illegal. The object of the statute was not to have the collection of the tax attempted again, as it had been attempted the year before. By the result of the proceedings of the year before the land, *quoad* this unpaid tax, was taken out of the class of resident lands, and placed in that of non-resident lands, and the only subsequent process of collection of it authorized was to begin with the supervisor, continue through the county treasurer, and become effectual with the comptroller by a sale of the premises as those of a non-resident. The process which the supervisor in fact adopted would have restored them to the class of resident lands. It ignored the requirements of law looking to a return of them to the comptroller. It did not pursue the lands themselves as the thing liable. It charged the unpaid taxes to a subsequent owner, the plaintiff. It made him as a person answerable, and affixed the lien of the

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tax to his goods and chattels. It collected the tax, not from the land, but from personal property, and it did this by inserting in the assessment roll of the following year, on the line with his name, the amount of the unpaid tax, and adding it to the amount of the tax legally assessed; in fact gave a judgment against him for the amount, for which warrant to collect was issued, leviable upon all his goods and chattels, and by other provisions of law collectible from his money and choses in action. (Chap. 318, Laws of 1842.) The supervisor had no power to do this, nor had the board of supervisors. He had not, nor had they jurisdiction to charge the plaintiff with this amount. If the effect of it had been only to charge the land again, there would be some show of propriety in calling it an irregularity merely. But it does in truth relieve the land and does impose a burden upon the person. It is easy to see how this came to be done. The Revised Statutes (vol. 1, p. 403, § 27) did authorize the supervisors, in such a case, to add a description of the land to the roll of the next year and charge the land with the uncollected tax, and directed that the same proceedings should be had in all respects as if such tax *had been laid* in the next year. This mode would charge the person to whom the land should be assessed the next year, because they still continued in the class of resident lands, and the tax upon them would be collected in the first instance by virtue of the warrant to the collector; and the law being so, it would have been right. But the act of 1855 changed this, and by it the supervisors of the town no longer had power to add this description of the land to the assessment roll of resident persons and of lands. All the power he had was to add to the non-resident assessment roll—a power to charge the land. This change in the law seems to have been overlooked. The learned counsel for the respondent contended with much earnestness that the concluding words of section 5, chap. 427, Laws of 1855, viz.: “and the same proceedings shall be had thereon in all respects, as if it was the land of a non-resident, and as if such tax had been laid in the year in which the description is so

added," gave to the supervisor of the town the same power as the assessor would have had, as to the making up of the assessment roll and putting thereupon the land; and further contended that, as the assessors, if they find the land of a non-resident occupied, shall assess it as they assess other occupied lands (1 R. S., 392; § 13, sub. 4), the supervisor had the power to do the same. But the power conferred upon the supervisor is explicitly defined. All that he may do is to "add a description thereof to the assessment roll of the next year *in the part thereof appropriated to taxes on lands of non-residents*, and shall charge the same with the uncollected tax of the preceding year." When he has done this his whole power is exhausted; and he can do nothing else but that, because the power is not given to him. "And the same proceeding shall be had *thereon*," *i. e.*, on or after that act of the supervisor, "as if it was the land of a non-resident." By the phrase, "the same proceedings," is meant the same *subsequent* proceedings, including the action of the county treasurer and of the comptroller of the State to sell the land for the collection of the tax. The lands not being those of a non-resident when assessed, but of one who, after the assessment and before collection of the tax, has ceased to occupy them; or, of one who, though still occupying, has no goods and chattels from which the tax may be made, this provision of law was added by the act of 1855, amending a section of the Revised Statutes (1 R. S., 403, § 27), so as to bring them within the operation of the provision of law in relation to non-resident lands. This act of the supervisor, the sole act he may do in relation to them, is the legal machinery by which the lands are transferred from the class of lands of a resident to that of a non-resident, and, this effected, "the same proceedings are had thereon," thereafter, "as if it were the land of a non-resident," which proceedings are provided for in the act of 1855, above cited.

It would seem, then, that in inserting the amount of this unpaid, and returned as unpaid, tax of the year 1866, in the assessment roll of residents and of their lands and personal

property, and thereby charging this tax of 1866 to the plaintiff in 1867, the supervisor of the town of Lima, and the board of supervisors, assumed to do that which he and they had no power to do. He and they assumed a power and jurisdiction of the person of the plaintiff which no law gave to them or him. The act was, therefore, void, and the tax thus assessed against him was illegal. (*Prosser v. Secor*, 5 Barb., 607; *People ex rel. Mygatt v. Supervisors of Chenango*, 11 N. Y., 563; *Mygatt v. Washburn*, 15 N. Y., 316.) But the collector of the town went forward under his warrant, and collecting the tax of the plaintiff by a sale of his chattels, paid it into the treasury of the county. From thence it has been appropriated and expended for the use of the county. We have held in *The Bank of the Commonwealth v. The Mayor, etc., of the City of New York*, decided in December, 1870, that when a tax assessed is illegal and the assessment has been set aside, on review thereof, and the amount of the tax has been collected and paid into the treasury of a municipal corporation and used by it for purposes prescribed by law, an action can be maintained against such corporation for its recovery. This decision was not put upon the ground that the defendant, the city of New York, was liable for the act or misfeasance of the assessing, collecting and receiving officers, as those of its agents. That action was not to recover of the defendant damages for such misfeasance. It was to recover money in the possession of the defendant which did not belong to it, but did belong to the plaintiff. That case is analogous to this. There the assessment was erroneous and was reversed, becoming on reversal as if it had never been. Here it is void, and is from the first as if it had never been.

It is suggested, however, that the same rule will not apply to this action against the county of Livingston as does to a city, and that in this State there is no authority for holding that an action will lie against a county for money paid to satisfy an illegal tax, and received and used by the county, while the tendency of the authorities is against it. *Lorillard v. The Town of Monroe* (11 N. Y., 392), is cited. That

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was an action against a town to recover \$485 "alleged to have been erroneously assessed as taxes upon lands" owned by the plaintiff, partly in the town of Monroe and partly in a town adjoining. The assessors of the town of Monroe had assessed in that town the whole tract, and a tax was therefore imposed and was paid by the plaintiff to the collector. As to so much of the land as laid without the town of Monroe, the assessors of that town had no jurisdiction, and their assessment was void. It was held by this court that the action would not lie. But it was looked upon, as appears from the opinion of DENIO, J., as an action to recover damages for the misconduct of the assessors in making the assessment. It was there shown that they were not the agents or servants of the town, and that it was not liable for their misconduct. It is expressly noticed in that opinion that it is not alleged in the complaint and was not proven on the trial, that any part of the money which was collected from the plaintiff was paid to the town or into its treasury. The case of *Preston v. The City of Boston* (12 Pick., 7), where an action was sustained, is referred to, and it is remarked that, in that case, the money illegally collected by compulsion was paid by the plaintiff to the treasurer of the defendant, and the action was for money had and received to the plaintiff's use, and that the city corporation, as such, had received the plaintiff's money, "which was an essential feq-ture," it is remarked, "wanting in this case." And that was the case of a city having full corporate powers, the officers concerned in imposing and collecting the tax being corporate officers. It must not be overlooked either, that the opinion lays much stress upon the restricted corporate capacity of towns, and holds that, for the purpose of the assessment and collection of taxes, they are but political divisions of the State. And in this connection it is to be noticed that the Revised Statutes, in the different chapters conferring corporate capacity upon town and county, use language as near as may be identical. (1 R. S., p. 337; id., 364.) So that the reasoning of *Lorrillard v. The Town of Monroe* will apply as well to an action of the same kind against a county. In the *People*

*ex rel. Mygatt v. Supervisor of Chenango* (11 N. Y., 563), the opinion goes somewhat further, and lays down the doctrine that a town is not liable to refund money paid for its use, obtained by an illegal tax, the assessment of which was void for want of jurisdiction. But this was not necessary to the judgment. That case was an application for a mandamus to direct the board of supervisors to levy upon the town the amount of the tax. But it was held that a mandamus is not an appropriate writ where there is a remedy by action; and that there was a remedy by action against the assessors of the town. It was *obiter*, therefore, to declare that the town was not liable for money paid for its use. Moreover, there is at least one distinction between the case of a town and that of a county. For, though their corporate capacity is declared in the same language, there are some accessories which a county has, but a town has not. A county has a treasury and a treasurer, and money may be paid not only for its use, but may be received directly for it into its treasury, and from thence paid out by it for its own use, as was done in the case in hand. In *Chegaray v. The City of New York* (12 N. Y., 220), some passages in the opinion indicate a doubt whether either trespass or assumpsit will lie against a county for the property taken or the amount of a tax illegally assessed. This doubt seems to rest in part upon the fact that portions of the money had been paid over to the treasury of the State. Such is not the case in the action now in hand. Apart from this, however, the point was not involved in that case, for it was held that the tax was legal. In *Swift v. The City of Poughkeepsie* (37 N. Y., 511), it was held that, although the property being exempt from taxation, the tax was erroneous, yet the assessors had jurisdiction, and their act in laying the assessment was valid, and until that action was reversed in some appropriate way, it had the effect of a judgment, and could not be questioned by a collateral action. The opinion goes farther, however, and declares that there is no precedent in this State for a suit to recover taxes "erroneously assessed." The case is sometimes cited to prove that no action will lie

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Opinion of the Court, per FOLGER, J.

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for a tax illegally assessed. It will be seen that, after holding that the act of assessment was a judicial act by officers having jurisdiction, and was valid and had the force of a judgment, it was not needful that the opinion should go farther, if it did so. But as the phrase it uses is "taxes erroneously assessed," it is not an authority to establish that money received for a tax *illegally* assessed without jurisdiction, may not be recovered back in any case. These cases are noticed because they are commonly relied upon to sustain the proposition above stated. However, no case in this State, in the court of last resort, it is thought, has yet held that money collected for a tax illegally assessed, and held and received by a county, can be recovered back by the person injured until after the assessment has been reversed. In *Hill v. The Supervisor of Livingston County* (12 N. Y., 52), an action of that kind was entertained. But it was there held, that the tax was legal and valid, and no mention is made in the prevailing opinion, that the county would or would not have been liable had the tax been held illegal. It is to be noticed, however, that DENIO, J., who before, in the same year, had given the opinion in *Lorillard v. The Town of Monroe* (*supra*), was in favor of an affirmance of the judgment appealed from, which judgment had upheld the action of assumpsit against the county for money had and received to the plaintiff's use, by means of an illegal tax. He was too careful a judge, not to have considered whether the one position was compatible with the other, and to have reached an affirmative conclusion thereon before determining that such judgment should be affirmed. In *Chapman v. The City of Brooklyn* (40 N. Y., 381), it is said, "it has repeatedly been held in other states, that taxes illegally imposed and collected might be recovered back from the municipality into whose treasury they had been paid. \* \* \* No very good reason can be urged against maintaining the rule, so far as it has been extended in other States, since there is no room for doubting that a remedy would be afforded between individuals for the recovery of money in cases where, by color of void judicial pro-

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ceedings, it might be forcibly taken from one and delivered to another." See pages 380, 381, and cases there cited from other States. This was an action to recover money paid for land sold on a void assessment, and the action was sustained, and though not an adjudication directly in point, it has close analogy. If it must be conceded that there is no direct authority in this State for holding that an action, as for money had and received to the use of the plaintiffs, will lie against a county, where money has been collected for an illegal tax, and paid into its treasury, and used by it for county purposes, the imposition of the tax not having been set aside, it must also be conceded that there is no direct authority to the reverse of that.

A county has, to some extent, a corporate capacity, the same as has a town. (*Lorillard v. Town of Monroe, supra.*) It has a capacity to sue and to be sued in the manner prescribed by law, all acts and proceedings against it to be in the name of its board of supervisors. (1 R. S., p. 364; *id.*, 473, § 95, §§ 1, 3, p. 384, § 2.) It may be seized of lands. (*Id.*, 365, § 5.) It may be possessed of and entitled to money, rights, credits, and other personal property. (§ 6.) It may owe debts. (§ 7.) It has a treasurer whose duty it is to receive all money belonging to the county, and pay out the same (*id.*, p. 364, § 20), keeping books of accounts thereof (§§ 21, 24), which are the books of the county, and all losses by his default, in the discharge of duty, are charged to the county. (*Id.*, 419, § 5.) Whenever any controversy or cause of action shall exist between any county and an individual, such proceedings shall be had, with judgment to the like effect, as in suits between individuals and corporations (*id.*, 384, §§ 1. 6), and judgment against the county or the board of supervisors on account of the liability of the county shall be a county charge, to be levied and collected. (§ 6; 2 R. S., 474, 475, §§ 102, 105.) The process is to be as against other corporations, to be served, not upon the supervisors as individuals, but upon the officers of the board, the chairman or clerk, as such. (*Id.*, 473, § 95; 1 R. S., 384, § 3.) There can be no doubt, then, that the statute law contemplated in a county so



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much of corporate entity as could own and hold real and personal property ; could incur debts and liabilities ; could have and receive money into and pay it out from its own treasury, and keep account thereof ; could have controversies with an individual and become liable to action from him, and be cast in judgment therein, under suits and proceedings like those against other corporations. If it may owe debts, it must have power to contract them by a promise to pay ; and if it may make a contract or promise, it may be sued upon it if it neglect to pay according to the terms thereof. If it may make an express promise, what is there in the nature of its existence, in the power it has and the liabilities it may incur, which forbids that it shall come under an implied promise to pay ? And may it come under an implied promise to pay which cannot be enforced against it ? In my judgment, the force of the provisions of the statutes in relation to counties is that it cannot. "No sound reason exists for exempting even municipal corporations from the controlling effects of this wholesome principle, that when the consideration has failed, the contract price should be repaid ;" for it is equally as unjust and inequitable for them to retain money they have acquired without consideration, as it is for a private person to attempt to do so. No principle of morality or law can be invoked against the latter which does not apply with the same force to the case of the former ; and this has generally been heretofore regarded as including corporate bodies as well as private persons (Angel & Ames on Corporations, 4th ed., §§ 237, 379, note 4), such bodies being held liable upon implied as well as expressed promises." (40 N. Y., 380.)

The facts in this case show that the county of Livingston, through the wrong act of the supervisor of the town of Lima, and of the board of supervisors of the county, has, by its county treasurer, had and received into its treasury, and has paid out therefrom, for its own use, the money of the plaintiff, to which it was not entitled. The receipt of that money by the treasurer was a receipt of it by the county. It has received that money by acts which were void for want of

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official power and jurisdiction to do them. The money, *ex æquo et bono*, belonged to the plaintiff; and in such case, whether it is withheld by a natural or artificial person, an action will lie to recover it, where such person is capable of suing and being sued. It is not necessary to assert that an action of tort will lie against a county for the redress of the injury. But an action for the money had and received will lie against the person or corporate body having received and without right withholding money, whether it was or was not obtained by wrongful means. It may be said that the power conferred upon the supervisor of the town of Lima, to determine what land should go upon the assessment roll as liable to a charge for taxes of the year before returned unpaid, being judicial (though that the power given was judicial in its nature is not admitted), and he having acted judicially, no action will lie to recover the money enforced from the plaintiff under his determination, until that determination is properly reversed. But that principle applies only to a judicial determination, which is based upon jurisdiction, and is erroneous or irregular. Where there is no jurisdiction the act is void, and the judgment or determination is a nullity. It stands in the way of no action or proceedings. Money got by it is money got by a wrong, and it cannot be set up to justify or protect the getting. And that it is void and a nullity for want of jurisdiction may appear in a collateral action to recover back what has been seized by it. (*Moses v. Macfurlane*, 2 Burrows, 1005; *Lazell v. Miller*, 15 Mass., 207; and see *Starr v. Trustees, etc.*, 6 Wend., 564-567; and 40 N. Y., 381.) I conclude that this action, being for money had and received, will lie against the county of Livingston. (*Joy v. The County of Oxford*, 3 Greenl. [Maine], 131.)

This brings us to the conclusion that the complaint in this action does state facts sufficient to constitute a cause of action. The defendants do not, then, shield their answer from the demurrer by a successful attack, upon their part, upon the complaint. The demurrer of the plaintiff is to the third answer of the defendant. It avers that the claim of the

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plaintiff has never been presented to the defendant nor any demand of payment made, nor has there been a refusal to make payment thereof.

The money which the plaintiff seeks to recover came into the treasury of the defendant by a wrongful act. It was the wrongful act of officers acting for the defendant, for it was the act of the board of supervisors, which is the board by which the county acts, and the county is chargeable also with knowledge of it. For property obtained by a wrongful act, wrongful to the knowledge of the party, no demand need be made before bringing action. Neither was the plaintiff affected by the provisions of 1 R. S., 386, § 4, that accounts for county charges of every description shall be presented to the board of supervisors of the county, to be audited by them. (*The People ex rel. Mygatt v. Supervisors of Chenango, supra.*) This claim was not a county charge within the purview of that provision, for the claims which fall within the general designation of "county charges," used in section 4, are specifically enumerated in section 3. There is no class there named into which this claim would fall. By 1 R. S., 367, § 4, sub. 2, the board of supervisors has power to examine, settle and allow "all accounts chargeable" against the county. This is but a paraphrase of the term county charges used in section 4, at page 386, above noticed. (*Brady v. Supervisors of New York*, 2 Sand., 469-471.) The claim of the plaintiff is not an account chargeable to the county, and although it is not necessary to assert that the board of supervisors has not power to examine, allow and settle it, it is not such an one as must be presented to the board for audit, and a proceeding taken to enforce it in case of refusal other than an action. (*Brady v. Supervisors, supra*, 472.) It is held in that case that claims growing out of the malfeasances of county officers, and claims for which the county may be liable arising from torts, are not necessarily to be presented for examination and allowance. (And see *McClure v. Supervisors of Niagara*, 50 Barb., 594; *Howell v. City of Buffalo*, 15 N. Y., 512.)

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No other provision of statute or rule of law is suggested by the learned counsel for the defendants, why a demand before action should have been made. We hold, then, that the demurrer to the third answer was well taken, and that the Special Term was right in ordering judgment thereon.

The first answer averred that the signing of the warrant to the assessment roll was not the corporate act of the county of Livingston, but the act of the several supervisors, as supervisors of the towns respectively.

The Revised Statutes (1 vol., p. 396, § 37) provide that, to each assessment roll delivered to a collector, a warrant, under the hands and seals *of the board of supervisors*, or a majority of them, shall be annexed. This is the act of the board, though to be performed by the members severally. A board of supervisors is a continuous body, though of changing members. (*Supervisors of Chenango v. Birdsall*, 4 Wend., 460.) There could be no propriety in having the supervisors of other towns, as individuals or several officers, sign and seal a warrant to the collector of any one town in the county. The authority to sign and to empower collection by levy and sale of goods and chattels if need be, is drawn by the statute naturally from the joint action of the board in the exercise of its power to equalize the valuation of the assessors of the different towns, to correct the different assessment rolls, and to set down in the last column thereof the sums to be paid as tax. The same joint power and joint exercise of it, though expressed by several action, is continued into the signing of the warrant. It is the board which does it, not each as an agent or officer respectively of the several towns, but all or a majority of them as the members of the body, which is a county body. The allegation of the complaint is that the "said defendant duly annexed its warrant thereto in the form prescribed by statute, under the hands and seals of its several members." It is frivolous and irrelevant to answer that it was not the corporate action of the county, but of the supervisors of the several towns, for it raises no issue material in the action. It may not be stricken out as frivolous, for sec-

## Statement of case.

tion 152 of the Code does not allow that. It may be stricken out as irrelevant, and the section permits that, and the plaintiff asks for that relief in the notice of motion.

The second answer is the denial of certain material allegations of the complaint. It is good in form. It puts in issue allegations which must be proved or admitted before the plaintiff can recover.

It is sufficient to say that it is a general denial, and cannot be stricken out on motion as false or sham. (*Wayland v. Tyssen and Thompson v. Erie Railway Co.*, decided by this court and not yet published.)\*

The judgment of this court should be, that the first answer of the defendant should be stricken out as irrelevant; that the demurrer to the third answer be sustained, and that judgment be ordered thereon; that the motion to strike out the second answer as sham or false be denied. And as neither has succeeded in full on the appeal to this court, without costs of this court to either, as against the other.

All concur, except PECKHAM, J., not voting, and RAPALLO, J., absent.

Judgment accordingly.

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LOTON K. HUNT and BENJAMIN VAN HOESSEN, Respondents,  
v. EDWARD ROBERTS, Appellant.

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One who guarantees the performance of a contract has the right, after default by his principal which would justify its termination, to require that the contract be terminated and the claim against himself, as surety be confined to the damages then recoverable.

The defendant guaranteed the performance, on the part of C., of a building contract made by C. and the plaintiffs, wherein the plaintiffs agreed to perform the work by the 15th of October, and C. to furnish materials, and pay a certain sum. After October 15th, the work being unfinished,

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\* Reported ante, *Wayland v. Tyssen*, p. 281; *Thompson v. Erie Railroad Company*, p. 468.

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Opinion of the Court, per RAPALLO, J.

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the defendant gave notice to the plaintiffs, that if they did not complete the work before the 1st of November, he would not be responsible as guarantor thereafter. The plaintiffs kept on until June following, being delayed by C's failure to supply materials. The defendant, by an arrangement with a third person, and to which the plaintiffs were not a party, had assumed C's obligations, and, after November 1st, urged the plaintiffs to perform, and himself supplied materials, but stated to them that he would not be personally responsible.

*Held*, in an action on the contract of guaranty, that the effect of the notice was an extension of time for performance, and continued the defendant's liability as guarantor, to November 1st only; and his liability was limited to the debt and damages which the plaintiffs were entitled to claim at that time.

(Argued June 1st; decided June 13th, 1871.)

APPEAL from an order of the General Term of the New York Common Pleas, affirming a judgment in favor of the plaintiffs, entered upon the report of Hamilton W. Robinson, Esq., sole referee.

The action was brought upon a contract of guaranty. The facts sufficiently appear in the opinion of the court.

*Aaron J. Vanderpoel*, for the appellant.

*E. N. Taft*, for the respondents, cited *Carman v. Pultz* (21 N. Y., 549); *Young v. Hunter* (2 Seld., 204); *Moses v. Bierling* (31 N. Y., 464); *Smith v. Gugerty* (4 Barb., 621); *Farnham v. Ross* (2 Hall, 167); *Jones v. Judd* (5 Comst., 411); *Green v. Haines* (1 Hill, 254).

RAPALLO, J. By a contract dated August 12, 1861, the plaintiffs agreed with Crossley to do the carpenters' work on the houses for the sum of \$2,625, and to complete the work on or before the 15th of October, 1861; Crossley was to furnish the materials. The defendant guaranteed the fulfillment of the contract on the part of Crossley.

The work was not finished on the 15th of October, and between that day and the 1st of November the defendant gave notice to the plaintiffs that if they did not complete the

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Opinion of the Court, per RAPALLO, J.

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work before the 1st of November, 1861, he would not be responsible as guarantor after that day. The plaintiffs, nevertheless, went on with the work until June, 1862, and have recovered in this action the contract price of the work up to that time.

It appears from the findings of the referee, that the delay in completing the work was owing to the fault of Crossley in furnishing the materials and preparing the houses. And further, that the defendant had, under a contract with Henry Day, the owner of the lots, assumed the obligations of Crossley in those respects, so that the default was in fact that of the defendant. What the arrangements were between Crossley and the defendant does not appear.

The defence cannot be sustained on the ground of any breach of the contract on the part of the plaintiffs, but rests wholly upon the effect of the defendant's notice that he would not be bound as guarantor after the 1st of November.

By the terms of the original contract, the work was to have been completed on the 15th of October. If not performed at this time, the defendant, had he not interfered in the transaction, or consented to an extension of the time, would have been entitled to have the matter closed. If the delay had been owing to the default of the plaintiffs, the defendant would have been discharged. If it was caused by Crossley, he had been guilty of a breach, and the defendant would have been entitled to insist upon the contract being terminated, and, on such termination, would have been liable as guarantor for the work done up to that time, and for the damages sustained by the plaintiffs in not being allowed to complete the job.

The effect of the notice was to extend the time for completion, as far as the guaranty was concerned, to the 1st of November. We think that the extension left the parties in the same position on the 1st of November in which they would otherwise have been on the 15th of October, and that it did not operate as an extension of the guaranty indefinitely to such time as might be necessary to complete the work, but

that the defendant had the right to insist that his liability, as guarantor, should be limited to the debt and damages which the plaintiffs were entitled to claim as of the date specified in his notice.

The referee finds, however, that after having given the notice that he would not be responsible as guarantor after the 1st of November, 1861, and from that date to June 13th, 1862, the defendant continued to urge the plaintiffs to perform their contract with Crossley, and supplied them with materials for that purpose, and continued to superintend the work, and that he and Crossley waived a strict performance of the work within the time specified by the contract.

These acts of the defendant, if unqualified by cotemporaneous declarations explaining their intent, would have justified the referee in finding that the defendant abandoned the position he had taken as to the continuance of his liability as guarantor, and consented that the plaintiff should go on after the 1st of November and complete the work under the original contract and guaranty.

But the referee further finds that after the 1st of November, and while the plaintiffs were engaged on the work, the defendant stated to them that he would not be personally responsible therefor. The evidence fully substantiates this finding, and shows that the defendant persistently maintained this position throughout all the dealings subsequent to the 1st of November.

It appears that the defendant had an interest in the completion of the buildings, though the precise relations between him and Crossley are not disclosed; that he desired their completion, but was not willing to be personally responsible for work done after the 1st of November. This he communicated to the plaintiffs. His request to them was in substance that they should go on and finish the building, trusting to Crossley or to the arrangements with Mr. Day for work done after the 1st of November, but not looking to the defendant as guarantor after that date.



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Opinion of the Court, per RAPALLO, J.

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The plaintiffs were at liberty to pursue that course, or to stop work and look to Crossley and the defendant for the damages. Crossley having by his default placed it in the plaintiffs' power to stop work without incurring any liability to him, the defendant, as his surety, had the right at any time after such default, to call upon them to take that course for his protection. In going on with the work, they acted with their eyes open and voluntarily assumed the risk.

The fact that the defendant was interested in the building, or that, under his contract with Day, he was bound to have furnished the materials, and that his default was the cause of Crossley's default, cannot vary the rights of the parties in this action. The defendant made no contract with the plaintiffs as principal. The plaintiffs contracted with Crossley as principal, and the defendant became his surety. The parties having made their contract in this form, and the action being founded on that contract, the defendant was entitled to assert all the rights of a surety. The arrangements, between Day and Crossley and the defendant, concerned them only, and their rights or equities, as between each other, cannot affect the contract between the defendant and the plaintiffs.

If the defence rested upon the allegation, that the plaintiffs had failed to perform their part of the contract, or that the contract had been varied, the facts found by the referee would have been abundant answers to those defences. But such is not the nature of the defence. It is, that after the contract had been broken, the defendant, in his character of surety, insisted that the plaintiffs should not go on and add to his liability as guarantor, but that, if they continued, they should look to the principal alone for all work done after that time. If they did not think proper to continue on those terms, they should have stopped work, and would have been entitled to recover of the defendant what they had earned up to that time and their damages for not being allowed to complete the job.

The learned referee, in substance, denied all effect to the notice given by the defendant, and seems to have held that he

that the defendant had the right to insist that his liability, as guarantor, should be limited to the debt and damages which the plaintiffs were entitled to claim as of the date specified in his notice.

The referee finds, however, that after having given the notice that he would not be responsible as guarantor after the 1st of November, 1861, and from that date to June 13th, 1862, the defendant continued to urge the plaintiffs to perform their contract with Crossley, and supplied them with materials for that purpose, and continued to superintend the work, and that he and Crossley waived a strict performance of the work within the time specified by the contract.

These acts of the defendant, if unqualified by contemporaneous declarations explaining their intent, would have justified the referee in finding that the defendant abandoned the position he had taken as to the continuance of his liability as guarantor, and consented that the plaintiff should go on after the 1st of November and complete the work under the original contract and guaranty.

But the referee further finds that after the 1st of November, and while the plaintiffs were engaged on the work, the defendant stated to them that he would not be personally responsible therefor. The evidence fully substantiates this finding, and shows that the defendant persistently maintained this position throughout all the dealings subsequent to the 1st of November.

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Opinion of the Court, per RAPALLO, J.

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The fact that the defendant was interested in the building, or that, under his contract with Day, he was bound to have furnished the materials, and that his default was the cause of Crossley's default, cannot vary the rights of the parties in this action. The defendant made no contract with the plaintiffs as principal. The plaintiffs contracted with Crossley as principal, and the defendant became his surety. The parties having made their contract in this form, and the action being founded on that contract, the defendant was entitled to assert all the rights of a surety. The arrangements, between Day and Crossley and the defendant, concerned them only, and their rights or equities, as between each other, cannot affect the contract between the defendant and the plaintiffs.

If the defence rested upon the allegation, that the plaintiffs had failed to perform their part of the contract, or that the contract had been varied, the facts found by the referee would have been abundant answers to those defences. But such is not the nature of the defence. It is, that after the contract had been broken, the defendant, in his character of surety, insisted that the plaintiffs should not go on and add to his liability as guarantor, but that, if they continued, they should look to the principal alone for all work done after that time. If they did not think proper to continue on those terms, they should have stopped work, and would have been entitled to recover of the defendant what they had earned up to that time and their damages for not being allowed to complete the job.

The learned referee, in substance, denied all effect to the notice given by the defendant, and seems to have held that he

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Statement of case.

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could not thereby fix the time as of which the amount of his liability should be ascertained. There is authority for the proposition, that a surety cannot, before breach, by his own act terminate a subsisting suretyship for a third person, so as to exempt himself from liability for future defaults of his principal (*Hough v. Warr*, 1 Carr. & P., 151; *Calvert v. Gordon*, 1 M. & Ry., 497; S. C., 7 B. & C., 809; *Gordon v. Calvert*, 2 Sim., 253, V. Ch.; S. C., 4 Russ., 581, Ld. Chr.; *Calvert v. Gordon*, 3 M. & Ry., 124); although an agreement to guarantee obligations to be incurred may be revoked before it is acted upon. (*Offord v. Davies*, 31 L. I. C. B., 319; *Agawam Bank v. Strever*, 18 N. Y., 513, 514.) Without now determining how far a surety can, before a breach of the engagement of his principal, protect himself from future defaults, we are clearly of opinion that, after a breach which will justify a termination of the contract, the surety has the right to require that the contract with the principal be terminated, and the claim against the surety confined to the damages then recoverable.

The judgment should be reversed and a new trial ordered, with costs to abide the event.

All concur, except PECKHAM, J., who dissents on the ground, that the subsequent directions of the defendant were inconsistent with, and a waiver of his notice that he would no longer continue liable as surety.

Judgment reversed and new trial ordered, costs to abide the event.

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HARVEY MATTOON and others, Respondents, v. JOHN N. YOUNG, Appellant.

The person through whom a party to an action derives title is not competent as a witness to prove transactions with a deceased person, as against the grantee of the latter. Although grantees are not named, they are within the reason of the act (Code, § 399), and the word "assignee" must be held to include them.

## Statement of case.

Under the amendment of 1867, if the interest formerly owned by such witness might be affected by the event of the action, he was incompetent, even though (as a grantor without covenants) he would have been competent at common-law.

Evidence of declarations by an owner of real estate, made publicly to the bidders assembled at a sheriff's sale thereof, and in the hearing of one who afterwards purchases at such sale, that he had no interest in the premises; that the entire title was in the execution debtor and whoever purchased at such sale would get good title, is competent as against the subsequent grantees or the heirs of such owner. If not sufficient of itself to show an estoppel (as to which *quere*), it is error to exclude it, as additional evidence that the purchase was induced thereby might have been given.

(Argued May 31st; decided June 22d, 1871.)

APPEAL from an order of the General Term of the Supreme Court in the fourth district, affirming a judgment in favor of the plaintiffs, entered on the report of Hon. Henry L. Knowles, referee.

This was an action of ejectment for certain lands in St. Lawrence county. It was commenced by Harvey Mattoon as sole plaintiff. An answer was interposed, setting up adverse possession, and the widow and heirs-at-law were thereupon made plaintiffs, under section 111 of the Code.

The plaintiffs are the widow and heirs of one John Mattoon. In 1855 John Mattoon executed a deed of the premises in question to the plaintiff Harvey, but the premises were then in the actual occupation of William Willard, claiming as owner.

In 1845 John Mattoon conveyed the premises to one James Mattoon, to hold during the natural life of John, the grantor.

In 1850 James conveyed to one Wheeler. Wheeler conveyed to one Sherwin in February, 1851. In 1849 James Mattoon's interest was sold by the sheriff, upon a judgment which had become a lien on his realty in 1849, to one Cooke, and in December, 1851, Cooke assigned the certificate of sale to Sherwin. The defendant derived title from Sherwin, through sundry mesne conveyances. The assignment by

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Statement of case.

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Cooke and the deed from Sherwin were without any covenants.

The referee found that the plaintiffs were entitled to recover possession, with damages.

On the trial the defendant called Sherwin and Cooke, to prove conversations with John Mattoon, since deceased, had prior to their respective purchases, in which Mattoon disclaimed any interest in the premises, and stated that he had conveyed all his interest to James Mattoon. It was objected that these witnesses were incompetent, under section 399 of the Code, and the objection was sustained.

The defendant offered to prove, by one Corey, that John Mattoon was present at the sheriff's sale and stated publicly to bidders, and in the hearing of Cooke, the purchaser, that he (John) had no interest in the premises; that the entire title was in James, and whoever purchased at the sale would get a good title. This testimony was objected to as immaterial and incompetent, and the objection was sustained and the evidence excluded.

John Mattoon died in 1859. The trial was had in 1867.

*Leslie W. Russell*, for the appellant, on the question of competency of evidence, cited Bacon Ab., vol. 9, title Statute, p. 245, 1st Inst., 272, 2d Inst., 301; 2 Starkey Ev., 393; *Johnson v. Root* (18 John., 80); *Van Hosen v. Bingham* (15 Wend., 164); 3 Starkey Ev., 1647; Dwarris on Statutes, 696; Smith's Com., 606, § 523 *et seq.*; *Dewey v. Goodenong* (56 Barb., 57, 58); *Holmes v. Carley* (31 N. Y., 289); *Chase v. N. Y. Central Railroad Co.* (26 N. Y., 523); *West v. McGurn* (43 Barb., 149); *Wykoop v. Habert* (43 Barb., 266); *Williams v. People* (45 Barb., 202); S. C., 33 N. Y., 688; *Freethy v. Freethy* (42 Barb., 641); *Archer v. Rockingham* (11 Mod. R., 150); *A. C. v. T. C.* (25 How., 432); *Smith v. Smith* (15 How., 165); *White v. Wager* (32 Barb., 250, affirmed 25 N. Y., 328); *Chegazay v. Mayor, etc., of New York* (13 N. Y., 220); *Jackson v. Collins* (3 Cow., 89); *People v. Utica Ins. Co.* (15 Johns., 380); *Quinn v.*

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*Moore* (15 N. Y., 422); *Fort v. Burch* (6 Barb., 68, 69); Per MARSHALL, Ch. J.; *United States v. Fisher* (2 Cranch, 389, 390); *Brewer's Lessees v. Blougher* (14 Peters, 198); Smith's Com., 711, § 576; Bouv. Law Dic., 399; *Mines v. U. S.* (15 Peters, 445); *Hamilton v. Wright* (37 N. Y., 502); Broom's Legal Maxims; *Parks v. Jackson* (11 Wend., 442, 446); *Dewit v. Bailey* (9 N. Y., 371, 375); *Brown v. Richardson* (20 N. Y., 475, 476); *Potter v. Potter* (18 N. Y., 53).

*Louis Hasbrouck, Jr.*, for the respondent, that the referee properly rejected the proof offered, cited *Jackson v. Sherman* (6 Johns., 19); *Jackson v. Cary* (15 Johns., 302); *Jackson v. Miller* (6 Cow., 751, affirmed 6 Wend., 228); *Walker v. Dunsbaugh* (20 N. Y., 170); *Brown v. Bowen* (30 N. Y., 519); *Wilcox v. Howell* (44 Barb., 401); Justice SELDEN in *Craieford v. Lockwood* (9 How. Pr. Reps., 547); *Knettle v. Newcomb* (31 Barb., 169).

GROVER, J. The counsel for the appellant insists that the suit was not prosecuted by the heirs of John Mattoon for the recovery by them of any estate descended to them as heirs, but that they are mere nominal parties, having no interest in the action, which is prosecuted for the benefit of Harvey Mattoon, the grantee of John, pursuant to section 111 of the Code, the grant being void, for the reason that the lands were at the time held adversely to the title of John Mattoon; and that therefore the case does not come within section 399 of the Code, declaring witnesses, under the circumstances specified, incompetent to testify to any transaction or communication between such witness and a person at the time of the examination deceased, etc. The case shows that the counsel is correct in the premises, but his conclusion cannot be sustained. The suit is prosecuted for the benefit of the grantee of John Mattoon, and although grantees are not named in section 399, they come within the reason of the statute, and must, therefore, be held to come within it. The testimony is made incompetent against a party prosecuting or defending

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the action as executor, administrator, heir-at-law, next of kin, assignee, legatee, devisee or survivor of such deceased person. This shows an intention to exclude the testimony as to all persons who have succeeded to or acquired the right of the deceased, which was to be affected by the testimony. This being so, the word assignee, which is more appropriately used to designate a transaction respecting personal property, must be held to include a grantee of real estate. Harvey Mattoon, prosecuting for the recovery of the land as the grantee of John Mattoon, the testimony was incompetent as against him, to the same extent as though he had claimed as heir of John. The question is whether the testimony of Sherwin and Cooke, offered by the defendant, was made incompetent by section 399 of the Code, as amended in 1867, which was the law at the time of the trial. This testimony, if competent, would have shown that John Mattoon was estopped from asserting title in himself, as against the title acquired by Sherwin, and also that acquired under the purchase of Cooke at the sheriff's sale, which had been acquired by the defendant, under which he claimed the land. Sherwin had conveyed the land by quitclaim deed, in the lifetime of John Mattoon, and before his grant to Harvey. Cooke assigned the sheriff's certificate given him upon his purchase, without warranty. Neither Sherwin nor Cooke were parties to the action, and neither had any interest that could be affected by its result. They were, therefore, competent witnesses, by the common-law, to prove the facts offered to be shown by their testimony. Neither had transferred his interest with a view to his competency as a witness. John Mattoon died about four years after his grant to Harvey, during which time the land was held adversely under the title acquired by the defendant, and, so far as appears, no effort was made by the grantee of John to recover the premises until after his death. The inquiry is, whether Sherwin and Cooke, who were competent witnesses by the common-law to prove the facts offered, were made incompetent by section 399, as amended in 1867. It must be conceded that, if the language of the section alone is



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regarded, it must be held to effect that result, because the interest formerly owned by them might be affected by the determination of the action. This brings it within the proviso declaring the witness incompetent to testify as to a transaction or communication had with the deceased. My associates hold that the language of the section is so clear in this respect that no other construction is admissible, and therefore hold that the ruling of the referee in rejecting the evidence was correct. Although inclined to the opinion that it was not the design of the legislature to render incompetent witnesses who were competent by the common-law, unless in cases where such competency depended upon changes introduced by the Code, or by transfers of the subject-matter of the action or some interest therein with a view of becoming witnesses, I shall not pursue the subject, as a statement of the grounds upon which such opinion is based would be entirely useless. The only remaining question arises for consideration upon the rejection of the testimony of Corey. He had never had any interest in the land. The defendant offered to prove by him that John Mattoon was present at the sheriff's sale upon the execution against James, and stated publicly to bidders and in the hearing of Cooke, the purchaser, that he (John) had no interest in the premises; that the entire title was in James, and whoever purchased at the sale would get a good title. The offer shows that the statement was made before the sale. From the circumstances under which it was made and the persons to whom it was made, it is clear that it was made with a view to influence the action of bidders, by inducing larger bids under a belief that the title of James, the execution debtor, was valid, and that he had no claim upon the land. The testimony offered, if credited and not explained or rebutted by other testimony, would require such a finding. It had already been proved that Cooke did purchase the land at the sale, and that the defendant held the title through a sheriff's deed given pursuant thereto. The only additional fact requisite to estop John Mattoon from setting up an existing title in himself, adverse to the title so acquired, was that

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Cooke was induced to purchase by a reliance upon this statement. This, I think a legitimate inference from the testimony offered. The statement was made at the time of sale publicly to the bidders with a view to influence their action, and thereupon the sale proceeded, and the property was purchased by one in whose hearing the statement was made. I think this would have warranted a finding that he was induced to purchase by the statement and his belief of its truth. The referee should have received and considered the testimony in this point of view. It was offered generally as evidence in the case. The objection was general that it was incompetent and immaterial. If competent for any purpose, it was error to reject it. It is no answer now to say that the evidence was incompetent to prove that the title was in James, as it could not be transferred to him by parol. Had the objection been placed upon that ground, the counsel for the defendant would have been required to point out the purpose for which it was offered, so as to prevent the referee from being misled. But it was not so made. It is no answer to say that the deed from John to James had been recorded, and that bidders should have resorted to that for information as to the title. They were not bound to search the record to see whether John had any title, but had a perfect right, so far as he was concerned, to act on his assurance that he had none. The estoppel of John Mattoon is equally applicable to his heirs and subsequent grantees. (*Munroe v. Parkhurst*, 9 Wend., 209.) The judgment appealed from should be reversed and a new trial ordered, costs to abide the event. Whether the referee would have been authorized to find from the evidence that Cooke was induced to purchase by the statement of John Mattoon, as offered to be proven by Corey, was not determined by the court. The court did determine that the referee erred in rejecting the testimony, as additional evidence, that Cooke was induced to act thereby, might have been given.

FOLGER, ANDREWS and RAPALLO, JJ., concur. CHURCH, Ch. J., ALLEN and PECKHAM, JJ., dissent.

Judgment reversed and new trial granted.

## Statement of case.

THE WEST POINT IRON COMPANY, Respondent, v. JAMES D. REYMERT and CHARLES D. SCHUBARTH, Appellants.

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A reservation in a deed will not give title to a stranger, but it may operate, when so intended by the parties, as an exception from the thing granted, and as notice to the grantee of adverse claims as to the thing excepted or "reserved."

In an action concerning real property, the claim that the trial should be had in another county and by jury, is waived by omitting to make such claim on the trial.

Mines, quarries and timber are protected by injunction, upon the ground that injuries to and depredations upon them are, or may cause, irreparable damage, and with a view to prevent multiplicity of suits; nor is it necessary that the plaintiff's right should be first established in an action at law.

A certificate of acknowledgment, taken in 1828, stating that the persons acknowledging were known to the officer "to be the persons who executed" the deed, was a substantial compliance with the statute.

(Argued June 8th; decided June 22d, 1871.)

APPEAL from an order of the General Term of the Supreme Court, in the second district, affirming a judgment for the plaintiff on a trial by the court without a jury.

The place of trial named in the complaint is Putnam county; the trial was had at Poughkeepsie, without any order for the change of the place of trial, but without objection at the trial.

The plaintiff claimed to be the owner of an iron mine, known as the "Pratt Iron Mine," in Putnam county. The defendants deny the plaintiff's title to the mine, and claim under a mining lease granted to them by Benjamin Forman, the surface proprietor of the farm upon which the mine is located. This action is for an injunction and damages. The question on the trial was upon the plaintiff's title to the mine. The plaintiff proved title by a possession and claim of ownership in one Abijah Pratt, Sr., his heirs, and their grantees down to the plaintiff, for a period of at least fifty years. Also by a chain of paper title, commencing with a deed from John Bailey to William W. Pratt, dated November 24, 1827,

## Statement of case.

and ending in a deed to the plaintiff. The officer taking the acknowledgment of this Bailey deed certified "came before me" the grantors, "known to me to be the persons who executed the within deed," etc., January 14, 1828. Also, by producing the deeds under which Benjamin Forman (the lessor of the defendants) derives his title, in which deeds was a clause "reserving the right to William W. Pratt to a vein of ore now wrought by him on the premises."

The defendants claim that they had expended money in good faith in developing the mine, in ignorance of plaintiff's title, and claimed the right to be reimbursed for such outlay. To answer this the plaintiff proved actual notice to the defendants before they made the outlay, and that when Forman executed the lease to defendants, he told them he did not own the Pratt mine, and had never owned it.

The court found and decided in favor of the plaintiff, and granted the injunction prayed for.

*George W. Stevens*, for the appellant, as to the place and manner of trial, cited *Bradley v. Aldrich* (40 N. Y., 504); *People v. Cent. R. R. of New Jersey* (24 N. Y., 283). That the equitable relief should not be granted until after an action at law, he cited *Heywood v. City of Buffalo* (14 N. Y., 540); *Bradley v. Aldrich* (40 N. Y., 504); *Mann v. Fairchild* (2 Keyes, 111). That the certificate of acknowledgment was defective, he cited *Norman v. Wills* (17 Wend. 136); *Gillett v. Stanley* (1 Hill, 121). On the merits, he cited *Shep. Touch.*, 80; 4 Greenl. Cruise Dig., 272; *Sprague v. Snow* (4 Pick., 54); *Craig v. Wells* (1 Kern., 315); *Corning v. Troy Iron Co.* (40 N. Y., 191); *Clark v. Cottrell* (42 N. Y., 527); *Williamson v. Brown* (15 N. Y., 354); *Childs v. Clark* (3 Barb. Ch., 52); *Hornbeck v. Westbrook* (9 J. R., 73); *Sherry v. Frickling* (4 Duer, 452); *Crary v. Goodman* (22 N. Y., 170); *Rich v. Baker* (3 Den., 79); *Frost v. Duncan* (19 Barb., 560); *Cole v. Blunt* (2 Bosw., 125); *Livingston v. Brosser* (2 Hill, 526).

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Opinion of the Court, per ALLEN, J.

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*Amasa J. Parker* and *E. A. Brewster*, for the respondent, insisted that the claim to jury trial, and in Putnam county, was waived. (*Penn. Coal Co. v. Del. & H. Canal Co.*, 1 Keyes, 72.) That an injunction was necessary and proper, and suit therefor properly brought. (*Livingston v. Livingston*, 6 John. Ch., 497; *Corning v. Troy I. & N. Fa'cy.*, 40 N. Y., 191; 2 Story Eq., § 929.) The certificate of acknowledgment was sufficient. (*Thurman v. Cameron*, 24 Wend., 87; *Jackson v. Gumaer*, 2 Cow., 532; *Troup v. Haight*, Hopkins, 239; *Deas v. Glover*, 1 Hoffm., 71; *Duval v. Covenhoven*, 4 Wend., 561; *Hunt v. Johnson*, 19 N. Y., 279).

ALLEN, J. The action was tried in the county of Dutchess, and by the court without a jury, without objection on the part of the defendants. If the trial should have been in Putnam, and by a jury, it was for the defendants to assert their rights at the trial; and by not then claiming them, they waived them, and must be regarded as having assented to the place and mode of trial.

It was a proper case for relief by injunction, if the plaintiff's right to the mine was established, and it was not necessary that the right should be first established in an action at law. The injury complained of was not a mere fugitive and temporary trespass, for which adequate compensation could be obtained in an action at law, but was an injury to the corpus of the estate.

Mines, quarries and timber are protected by injunction, upon the ground that injuries to and depredations upon them are, or may cause, irreparable damage, and also with a view to prevent a multiplicity of actions for damages that might accrue from a continuous violation of the rights of the owners. (*Livingston v. Livingston*, 6 J. C. R., 497; *Thomas v. Oakley*, 18 Vesey, 184, Story's Eq. Juris., §§ 929 and *seq.*) Equity will interpose by injunction to prevent an encroachment upon the rights of a proprietor in a running stream, and will exercise jurisdiction to compel a restoration of running water to

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Opinion of the Court, per ALLEN, J.

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its natural channel. (*Corning v. Troy Iron and Nail Factory*, 40 N. Y., 191.) The certificate of acknowledgment of the grant from Bailey and wife to William W. Pratt was sufficient in form, the commissioner by whom the same was taken certifying that the persons acknowledging the execution were known to him "to be the persons who executed the" deed. (*Jackson v. Gumaer*, 2 Cow., 552; *Troup v. Haight*, Hopk., 239; *Hunt v. Johnson*, 19 N. Y., 280.) The certificate was a substantial compliance with the act under which it was taken (1 R. S., 369, §§ 1, 2.); and as it is only *prima facie* evidence of the facts stated, and may be contradicted, and is in one of the forms very generally followed, it ought not to be rejected for want of a literal adoption of the very words of the statute. The plaintiff made a *prima facie* title to the mine, and showed the use and occupation of it by those from whom title was derived for a long series of years. The earliest recognition of the plaintiff's title was in a deed, under which the defendants' lessor derived his title, from Thomas D. Denny and wife to John and James Bailey, bearing date August 27th, 1824, conveying the tract of land within which the mine is situated, and "excepting an ore bed conveyed to Abijah Pratt by Richard D. Denny on the premises hereby conveyed." How Richard D. Denny had or acquired title to the ore bed does not appear; but evidence was given that for a period of fifty years it had been known and called the "Pratt iron mine." Abijah Pratt was the ancestor of William W. Pratt, who, upon his death, succeeded to the occupation of the mine, and to whom John Bailey, who had acquired the right of his co-grantee, James Bailey, in 1828, granted the ore bed or mine in perpetuity. This grant was probably made to supply the place of that to Abijah Pratt, which had been lost.

The plaintiff's title was derived from successory grants from William W. Pratt. The only evidence of title in the defendants was a lease from Benjamin Forman, dated August 25th, 1866, for the term of fifty years. The several grants under which plaintiff claims were recorded in the proper

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Opinion of the Court, per ALLEN, J.

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office and books; and the judge finds, that the several owners respectively were in possession of the mine during those respective ownerships, and that the defendants, at the time they took their lease, had actual notice that the lessor did not claim and had no right to the mine. Forman derived title to the *locus in quo* under and through the Baileys, who took title under the deed from Thomas D. Denny, and all the deeds in the chain of title, down to and including that to Forman, contained a clause recognizing the right of William W. Pratt to the mine by "reserving to William W. Pratt the right he has to the ore bed and the right of way to the West Point foundry, as now used," or in similar and substantially the same words. A reservation in a deed will not give title to a stranger, but it may operate, when so intended by the parties, as an exception from the thing granted, and as notice to the grantee of adverse claims as to the thing excepted or "reserved." The plaintiff's title is independent of the reservation, which is only important here as evidence of the extent of the grant to the defendants' lessor, and of notice to all claiming under the grant, of the existence of a title to the ore bed in others. It is true that evidence was given that in 1868, and after the commencement of this action, Forman obtained a deed of the premises from the heirs-at-law of Richard D. Denny, but there was no evidence that Richard D. Denny ever had any title, other than that which he granted to Abijah Pratt prior to 1824, or that he was ever in possession of the premises, nor was there proof of any fact tending to show that the pretended grantor had any title or estate to convey. The plaintiff's title was abundantly established. That set up by the defendants was sham. The judgment was in all respects right and should be affirmed.

All concur. Judgment affirmed.

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Statement of case.

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JOHN P. MORRIS, Respondent, v. ANDREW S. WHEELER,  
impleaded with MARGARET KENNY and others, Appellant.

MARGARET BARR, Respondent, v. THE SAME APPELLANT.

In an action for the foreclosure of a mortgage, sale of the premises and satisfaction of the debt secured, all persons having liens upon the equity of redemption are necessary parties.

A judgment against husband and wife, for damages and costs, entered in an action of ejectment, duly docketed, is a lien upon the real estate of the wife. If she is owner of the equity of redemption in mortgaged premises, the judgment creditor is a necessary party in an action to foreclose the mortgage.

Although costs in actions of foreclosure are in the discretion of the court, yet if it appears that such discretion has been exercised under an erroneous view of the law affecting the rights of the parties, it is the duty of the appellate court to correct the error.

(Argued June 8th ; decided June 22d, 1871.)

Two appeals from orders of the General Term of the Supreme Court, in the second district, affirming judgments of foreclosure with costs and five per cent allowance, rendered at Special Term.

These were actions for the foreclosure of two mortgages on the same premises, both commenced at the same time.

The defendant, Margaret Kenny, was the owner in fee of the mortgaged premises up to the afternoon of June 3d, 1869, when the appellant, Wheeler, purchased the same. Summons was served on Wheeler June 4th, 1869.

The complaints are in the usual form for foreclosure of a mortgage. The answer alleges defect of parties, in that one Griswold had recovered a judgment against the defendants, Edward Kenny and Margaret Kenny, Margaret being then owner in fee of the mortgaged premises, which judgment was docketed before the commencement of the action, and in August, 1868, and was for \$182.09.

It appeared on the trial, that this judgment was rendered in an action of ejectment, "against Edward Kenny, Margaret Kenny, his wife, and William Kenny," and that it had been



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Opinion of the Court, per GROVER, J.

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satisfied, as to Edward and Margaret, subsequent to the service of the answers in these actions, and on the 22d of October, 1869.

Judgment was rendered in each action for foreclosure and sale, with costs and an additional allowance of five per cent, to be paid from the avails of sale.

*Samuel Hand*, for the appellant, that the judgment was a lien, cited *Corn. Exch. v. Babcock* (42 N. Y., 613); *Taylor v. Crane* (15 How., 358); *Schuyler v. Marsh* (37 Barb., 350); *Eckerson v. Valmer* (11 How., 42); *Howland v. Fort Edward Paper Mill Co.* (8 How., 505); *Horton v. Payne* (27 How., 374); *First Nat'l Bank of Canandaigua v. Carlinghouse* (53 Barb., 615); *Thompson v. Sargent* (15 Abb., 452). That Griswold was a necessary party, he cited *Ensworth v. Fanning* (4 John. Ch., 605); *McGown v. Yerks* (6 John. Ch., 450).

*William S. Cogswell*, for the respondent, urged that satisfaction of the judgment was analogous to a discontinuance before notice of trial when there is plea of another action pending. (*Averill v. Patterson*, 10 N. Y., 500; *Swart v. Borst*, 17 How., 69; *White v. Smith*, 4 Hill, 166.) That Griswold was never a necessary party, citing *Baldwin v. Kimmell* (16 Abb., 354); *Valentine v. Lloyd* (4 Abb. N. S., 371); *Corn. Exch. v. Babcock* (42 N. Y., 613); *Porter v. Mount* (45 Barb., 422). That costs were in the discretion of the court. (*Pratt v. Ramsdell*, 16 How., 59; *Barton v. Cleveland*, id., 364).

GROVER, J. When there is a defect of parties, not appearing upon the face of the complaint, the objection should be taken by the answer. (Code, § 147.) In an action for the foreclosure of a mortgage, and a sale of the mortgaged premises for the satisfaction of the debt secured, all persons having liens upon the equity of redemption are necessary parties. (*Ensworth v. Fanning*, 4 Johns. Ch., 605; *McGown v. Yerks*,

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Opinion of the Court, per GROVER, J.

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6 id., 450.) The answer set forth that Nathaniel L. Griswold was a necessary party, for the reason that he had recovered a judgment in the Supreme Court against Edward Kenny and Margaret, his wife, which was docketed in Kings county and was a lien upon the equity of redemption in the mortgaged premises. If this was true, the objection interposed was valid. Upon the trial the defendants introduced the record of a judgment in the Supreme Court, from which it appeared that Griswold had commenced an action for the recovery of the possession of certain premises in Kings county, against Edward Kenny and Margaret, his wife. That the defendants appeared in said action and an issue of fact was joined therein; and upon trial a verdict was found for the plaintiff against both defendants, upon which judgment was rendered against both for damages and costs, which was duly docketed so as to become a lien upon real estate. It further appeared that Margaret Kenny, the wife, was the owner of the equity of redemption, at the time the judgment was docketed, in the premises sought to be foreclosed by this action. The judge found, as a legal conclusion, that this judgment was not a lien upon the separate real estate of Margaret Kenny, and that Griswold was not therefore a necessary party. In this I think the learned judge erred. Upon the argument the question was discussed whether, in an action of ejectment against husband and wife, a judgment could be recovered against the wife. In case the wife claimed the land as her separate property, adverse to the title of the plaintiff, she may be made a defendant for the purpose of determining the validity of such claim. (Code, § 118.) In such case, if her title was found invalid, a verdict and judgment against her would be proper. But the question in this case is not whether the judgment was rightly rendered against the wife. The court had jurisdiction of the parties, and of the subject-matter, and the judgment rendered, if erroneous, bound the parties and their property, until reversed. The question then is, whether a judgment against husband and wife is a lien upon the real estate of the wife. Section 282 of the Code declares

## Opinion of the Court, per GROVER, J.

that a judgment shall be a lien on the real property, in the county where the same is docketed, of every person against whom it was rendered. This includes a married woman, the same as any other judgment debtor. Griswold was therefore a necessary party, and had there been no fact proved, obviating the objection, judgment ought not to have been given for the plaintiff, but steps should have been taken to make Griswold a party upon such terms as to costs as the court thought just. But it was shown by the plaintiff that the judgment of Griswold against Kenny and wife had been satisfied intermediate the service of the answer and trial. He was no longer a necessary party. The plaintiff was entitled to judgment without making him such. The only question was as to the costs of the action. These were in the discretion of the court. (Code, §§ 304-306; *Pratt v. Ramsdell*, 16 How. Pr., 59.) With the exercise of this discretion this court will not interfere, unless it appears that it was exercised under erroneous views of the law affecting the rights of the parties. In this case it does so appear. The judge held that the judgment against Mrs. Kenny was not a lien upon the equity of redemption, and consequently that the answer setting up the non-joinder of Griswold as a party defendant constituted no defence, and that the plaintiff would have been entitled to judgment, although that judgment had not been satisfied before the trial. Under this view of the law, the judge very properly held that the plaintiff was entitled to recover costs. He would not so have held had he regarded the judgment of Griswold a lien, and consequently Griswold a necessary party, and the plaintiff not entitled to judgment until he was made a party, or the difficulty otherwise obviated. It is manifestly unjust to charge the defendant with the costs incurred in litigating a question in which the plaintiff was in the wrong; and yet, had the Special Term done this, under correct views of the law, this court would not have interfered with the exercise of its discretion. But the court having allowed costs to the plaintiff, under the mistaken idea that the answer, when interposed, constituted no defence, it is the

## Statement of case.

duty of this court to correct the error. The plaintiff was not entitled to the per centage given by section 308 of the Code, unless he recovered costs in the action. This per centage is given as costs, in addition to the other allowances therefor. The case shows that the parties have been strenuously litigating through all the courts upon a mere question of costs, and as the defendant was in the right upon the question presented by the answer, and in the wrong in not having paid the debt when due, and withholding such payment during the litigation, justice will be done by denying costs to each as against the other.

The judgment of the Special and General Terms allowing costs, including the per centage, should be reversed, and the residue of the judgment affirmed, without costs to either party in this court.

All concur.

Judgment reversed as to the allowance of costs and per centage, and affirmed as to the residue, without costs in this court to either party.

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JABEZ A. BOSTWICK, Appellant, v. THE BALTIMORE AND OHIO RAILROAD COMPANY, Respondent.

When goods are shipped under a verbal agreement for the transportation thereof, such agreement is not merged in a bill of lading, partly written and partly printed, delivered to the shipper after he has parted with control of his goods, although such bill of lading, by its terms, limited the liability of the carrier and expressed on its face, that by accepting it, the shipper agreed to its conditions. The mere receipt of the bill, after the verbal agreement has been acted on, and the shipper's omitting, through inadvertence, to examine the printed conditions, are not sufficient to conclude him from showing what the actual agreement was, under which the goods had been shipped.

(Argued May 18th; decided June 22d, 1871.)

APPEAL from a judgment of the Supreme Court at General Term in the first district, overruling exceptions taken by the plaintiff at the trial, and dismissing the complaint.

## Statement of case.

The action was brought to recover the value of sixteen bales (part of fifty-four bales) of cotton, shipped by the plaintiff from Cincinnati to New York. The agreement for transportation was made at Cincinnati between the 12th and 15th of November, 1865, by the plaintiff, with Grant F. Cooke, as agent for a line of railroads, of which that of the defendant formed a part. The plaintiff testified, that he contracted with Cooke for the carriage of the fifty-four bales of cotton from Cincinnati through to New York by "*all rail*," and agreed to pay "*all rail*" rate, which was \$1.60 per hundred pounds, the rate by rail and water being at that time \$1.50. The entire freight was to be paid in New York. After making this contract, the plaintiff delivered the cotton at the depot, and took depot receipts, and sent these receipts to the office of Cooke to obtain bills of lading. Cooke did not deliver any bill of lading at the time, but one or two days afterward sent to the plaintiff's office a bill of lading, signed by himself as agent of the line, dated November 15th, for the fifty-four bales. The cotton had at that time been shipped. It would take about one week to transport it from Cincinnati to New York.

The cotton was conveyed by rail to Baltimore, and there shipped on steamers for New York. Thirty-eight bales went through safely to New York; thirty-five of them were received there on the 23d of November, and three on the 29th. The consignees paid to the defendant, at New York, the entire freight on the fifty-four bales from Cincinnati through. The custom of the companies was to send notice to the consignee of the arrival of the vessel, and to demand the freight, before delivery of the goods.

The sixteen bales were never delivered. On the 11th of December the consignee received a notice dated the 5th of December, that the cotton was on board the steamer Alleghany, and afterward received information that the sixteen bales were lost. It was admitted by the defendant on the trial that the sixteen bales were shipped at Baltimore for New

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Statement of case.

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York on board the steamer Alleghany, which was wrecked on the passage.

The defendant claimed exemption from liability by reason of certain printed conditions, contained in the bill of lading, to the effect that the goods should be transported by certain railroad companies to Columbus, and there delivered to the Central Ohio railroad, and by it transported to Belle Air, and there delivered to the agents of the next connecting steamboat, railroad company or forwarding line, and that the railroad companies and the steamboat companies with which they connected should not be liable for loss or damage by the dangers of navigation while on the sea, rivers, lakes or canals; that each company should be answerable only for losses happening while the goods were in its custody, and that by accepting the bill of lading the shipper agreed to its stipulations and conditions.

The plaintiff testified that his attention was not called to these printed conditions; that the rate of freight was written in the bill of lading as \$1.60 per 100 lbs., which was the all rail rate; that he was aware of the fact that goods shipped from Cincinnati for New York sometimes came by water from Baltimore; that the defendant was in the habit of shipping by "all rail," or "rail and water;" that when they shipped by rail and water they meant around by sea, and charged ten cents per 100 lbs. less.

The defendant's counsel moved to dismiss the complaint on the grounds, 1st. That it had not been proved that Cooke could make any bargain for the defendant. 2d. That the contract had been reduced to writing, and that the rights of the parties must be governed by the bill of lading.

The plaintiff asked the court to submit the questions of fact to the jury; also to direct a verdict for the plaintiff. Exceptions were duly taken. The court granted the motion for a nonsuit, and directed the exceptions to be heard in the first instance at General Term.

The court, at General Term, overruled the plaintiff's exceptions, and ordered judgment dismissing the complaint.

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Opinion of the Court, per RAPALLO, J.

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*D. M. Porter*, for the appellant, cited *Bancroft v. Winshear* (44 Barb., 209); *Le Sage v. G. W. Railway* (1 Daly, 306); *Blossom v. Griffin* (3 Kern., 569); *Wilcox v. Parmlee* (3 Sandf., 610); *Belger v. Dinsmore* (34 How., 421); *De Barre v. Livingston* (48 Barb., 511); *Fish v. Hubbard's Exrs.* (21 Wend., 657); *Smith v. N. Y. Cent. R. R.* (43 Barb., 225); *Bradley v. Washington, etc.* (13 Peters, 89); *Spencer v. Babcock* (22 Barb., 326); *Scovill v. Griffiths* (2 Kern., 509); *Dana v. Fiedler* (2 Kern., 40); *Pollen v. Le Roy* (30 N. Y., 549); *Woodruff v. Com. Ins. Co.* (2 Hilt., 122); *Coope v. Smith* (1 Smith's Lead. Cas., 305); *Johnson v. N. Y. Cent. R. R.* (33 N. Y., 610); *Miller v. Steam Nav. Co.* (6 Seld., 431); *Gould v. Chapin* (20 N. Y., 259); *Schröder v. Hudson Riv. R. R.* (5 Duer, 55); *Hart v. Rens. R. R.* (4 Seld., 37); *Quimby v. Vanderbilt* (17 N. Y., 306); *Read v. Spaulding* (30 N. Y., 630); *Michaels v. N. Y. Cent. R. R.* (id., 564); *McAndrews v. Adams* (1 Bing. N. C., 29); *Finn v. Simpson* (4 E. D. Smith, 276); *Camden and A. R. R. v. Burke* (13 Wend., 611); *Pemberton v. Bailey* (8 Wend., 600); *Stillwell v. Coope* (4 Den., 225); *Hurd v. Pendrigh* (2 Hill, 502); *Brooks v. Ball* (18 John., 337); *Wright v. Hooker* (12 N. Y., 59); *Sheldon v. Atlantic, etc., Ins. Co.* (26 N. Y., 460).

*Amasa J. Parker*, for the respondent, cited *Renard v. Sampson* (2 Kern., 561); S. C., 2 Duer, 285; *White v. Van Kirk* (25 Barb., 16); *Crerry v. Holly* (14 Wend., 26); *Hutchins v. Hibbard* (34 N. Y., 24); *First Bap. Ch. v. Brooklyn Fire Ins. Co.* (28 N. Y., 153); *Schoeppel v. Oswego and Syr. Pk. Rd. Co.* (7 How., 94); *Builland v. Van Nostrand* (24 Barb., 25); *Isles v. Tucker* (5 Duer, 393).

RAPALLO, J. No evidence was introduced on the part of the defendant showing any limit to the authority of Cooke in making contracts for transportation by the line in question. That he was the agent of the defendant and the other companies for the making of such contracts, is shown by the

facts, that a portion of the bales shipped under the contract made by him were carried through, and that the defendant received the freight for the entire distance on all the bales, according to the contract; that on the face of the bill of lading, of which the defendant claims the benefit, the name of Cooke is printed as agent, at Cincinnati, of the line of transportation of which the defendant's road forms a part, which purports to be a through line, and that the bill is signed by him as such agent.

In the absence of any explanation by the defendant, these facts were at least *prima facie* evidence of the authority of Cooke to make the verbal contract testified to by the plaintiff.

There was no contradiction attempted of the evidence of the plaintiff that he made a verbal contract with Cooke for the transportation of the fifty-four bales through to New York by "all rail," and agreed to pay the all rail route. The goods were shipped under this verbal agreement, before any written contract or bill of lading had been tendered to the plaintiff.

The verbal agreement had been acted upon, and under it the plaintiff had parted with all control over his goods.

The rule that prior negotiations are merged in a subsequent written contract does not apply to such a case as this.

If the plaintiff had expressly assented to the terms of the bill of lading subsequently delivered to him, such assent would operate as a change of the terms of the contract originally made, and under which he had parted with his property. But after the verbal agreement had been consummated and rights had accrued under it, the mere receipt of the bill of lading, inadvertently omitting to examine the printed conditions, was not sufficient to conclude the plaintiff from showing what the actual agreement was under which the goods had been shipped.

In the case of *Corey v. The N. Y. Cent. R. R. Co.*, decided in April, 1871, not reported, we held that conditions contained in a bill of lading, not delivered until after the shipment and



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Opinion of the Court, per RAPALLO, J.

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loss of the goods, though before the loss was known, did not control the rights of the shippers.

The present case is analogous in principle to the one cited.

The goods having been shipped under an agreement that they should be carried "all rail," a loss occasioned by their being carried by sea is no excuse for their non-delivery to the plaintiff.

There was also some evidence of delay in sending forward the portion of the goods which was lost. This delay, unexplained, tended to show negligence on the part of the defendant.

It is true that there is no allegation of negligence in the complaint. But the complaint alleges the non-delivery of the goods, which was a breach of duty on the part of the defendant, unless excused.

The defendant sets up, in excuse, the conditions of the bill of lading, and the loss of the goods by the dangers of navigation. Even if the conditions were binding upon the plaintiff, it was competent to rebut this defence by showing that the goods became exposed to the danger by reason of the default of the defendant, and that if they had been forwarded with due diligence, they would not have been on board of the vessel which was lost. (*Michaels v. The N. Y. Cent. R. R. Co.*, 30 N. Y., 564.)

If there was negligence on the part of the defendant in sending forward the goods, the conditions of the bill of lading would not exempt the defendant from liability.

The judgment should be reversed and a new trial ordered, with costs to abide the event.

All concur. Judgment reversed and a new trial ordered.

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120 187SAMUEL STRONG, Respondent, v. THE NATIONAL MECHANICS'  
BANKING ASSOCIATION, Appellant.

The plaintiff deposited with the defendant certain bonds, as security for loan payable on demand, and subsequently made overdrafts upon his account with the defendant to a large amount. The defendant, learning of such overdrafts and claiming a banker's lien upon the bonds therefor, as well as for the loan, and being unable to give notice or make demand upon the plaintiff, sold the bonds, without any demand or notice, and at private sale. The surplus of avails, after satisfying the loan, was credited upon the overdraft, but afterwards the defendant sold and transferred to a third person the whole amount of such overdraft. The plaintiff, after tender of the amount of the loan and demand of the bonds, sued for the conversion thereof.—*Held*, that the sale of the bonds at private sale was unauthorized, and the plaintiff could elect either to affirm such sale and claim the benefit of the surplus in reduction of his overdraft, or repudiate the sale and credit of surplus and hold the defendant responsible for the bonds; *held*, further, that the plaintiff having repudiated the sale, the defendant's transfer of its claim on account of overdraft precluded it from using any part thereof by way of offset or counter claim, notwithstanding the consideration for such transfer was much less than the amount so overdrawn.

(Argued May 29th; decided June 22d, 1871.)

APPEAL from an order of the General Term of the Supreme Court, in the first district, affirming a judgment entered on a verdict directed for the plaintiff.

The action was brought to recover damages for an alleged conversion of certain bonds deposited with the defendant as security for a loan of \$15,000. After the bonds were so pledged, the plaintiff overdrew his account with the defendant in one day to the amount of some \$53,000. The defendant thereupon made private sale of said bonds, without any demand of payment or notice of sale to the plaintiff, being unable to find the plaintiff for that purpose; entered the amount realized to the credit of the plaintiff, the surplus thereof over and above the amount due upon the loan being credited upon the overdraft. On the same day the defendant, in consideration of about \$35,000, sold and assigned to one White, a son-in-law of the plaintiff, its claim against the plain-

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on of such overdraft, amounting to over \$53,000. Amount of the loan and interest was subsequently tendered to the defendant and a demand of the bonds made on behalf of the plaintiff, which was refused. Whereupon this action was commenced. It appeared that one Todd claimed an interest in the bonds, a portion of them having been pledged by him to the plaintiff and his former partner, Hibbard. Mr. Hibbard had retired from the firm and the plaintiff had assumed the whole loan, and kept the subsequent account with the defendant in his individual name. The court directed a verdict for the value of the bonds, less the loan and interest for which they were pledged, and judgment was entered thereon for \$4,718.25, with costs.

*William Henry Arnoux*, for the appellant, cited *Davis v. Bowsher* (5 T. R., 488); *Collins v. Martin* (1 Bos. & Pul., 648); *Wookey v. Pole* (4 Barn. & Ald., 1); *Brandas v. Barnett* (12 Clark & F., 787); *Kruger v. Wilcox* (Ambler, 252); *Barnett v. Brandas* (6 Man. & G., 630); *Jones v. Peppercome* (1 John., 430); *Bosanquet v. Dredman* (1 Stark, 1); *Jourdain v. Le-fevre* (1 Esp., 66); *Scott v. Franklin* (15 East, 428); *O'Conner v. Majoribanks* (4 M. & G., 435); *Ex parte Steward* (3 Mont. D. & D., 265); *Ex parte Froggatt* (id., 322); *Ex parte Barkworth* (2 DeG. & J., 194); *Ex parte Carrick* (id., 208); *Bank of Metropolis v. New England Bank* (1 How. U. S., 234); S. C., 6 How. U. S., 212; *Van Amer v. Bank of Troy* (8 Barb., 312); 2 Kent, 641; 49 Barb., 203; *Foley v. Hill* (2 H. Lds. Cas., Cl. & F., 28); *Pott v. Blavait* (8 Scott N. R., 318), on the question of banker's lien and right to sell without demand.

*Noah Davis*, for the respondent, cited *Garlick v. James* (12 John., 145); *Stearns v. Marsh* (4 Den., 227); *Cortleyou v. Lansing* (2 Caine's Cas. in Error, 204); *McLean v. Walker* (10 John., 472); *Wilson v. Little* (2 N. Y., 443); *Markham v. Jaudon* (41 N. Y., 236); *Wheeler v. Newbold* (16 N. Y., 392); *Dykes v. Allen* (3 Hill, 497); *Tucker v. Wilson* (1 Piere Williams, 260); *Romain v. Allen* (26 N. Y., 809).

## Opinion of the Court, per RAPALLO, J.

RAPALLO, J. There was a specific pledge of the bonds by Strong to the bank, for an advance of \$15,000, payable on demand. In addition to this, the bank claims that it had a banker's lien on the bonds for Strong's overdraft of \$53,779.89; and it is urged on the part of the appellant, that even if, at the time of the sale, the \$15,000 loan was not due for want of a demand of payment, yet the overdraft was due without any demand, and the bank had the right to satisfy that lien. That Strong had absconded, and it being impracticable to give him notice of the time and place of sale, it was lawful to sell without such notice.

Assuming that the banker's lien existed as claimed, it is, to say the least, doubtful whether a mere lien, not created by an express pledge, can be enforced by an extra judicial sale. (*Pothonier v. Dawson*, Holt, N. P., 385; 2 Kent, 642.) And the proposition that the inability of a pledgee or lienor to make a demand and give notice of the time and place of sale, entitles him to sell without such demand or notice, and without judicial proceedings, is not sustained by the authorities. (*Cortelyou v. Lansing*, 2 Caine's Cas., 201; *Garlick v. James*, 12 Johns. R., 150; *Stearns v. Marsh*, 4 Den., 227; Story on Bailments, §§ 309, 310). But even if the positions of the appellant in these respects could be maintained, the further objection remains, that the bonds were sold at private sale. Even if demand and notice could be dispensed with, a private sale in such a case cannot be sustained, unless the parties have stipulated for such a sale. (*Dykers v. Allen*, 7 Hill, 497; *Wheeler v. Newbould*, 16 N. Y., 392; *Willoughby v. Comstock*, 3 Hill, 389.)

Immediately after the sale of the bonds, the bank sold and transferred its entire claim for the overdraft to White. At the time of consummating this sale, the bank attempted to reduce the amount of the overdraft by the credit of the surplus, which the bonds had produced over the amount loaned thereon, and to assign only the residue of the overdraft. But White objected to this reduction, and insisted upon having the whole amount of the overdraft assigned to him

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The bank yielded to this demand, and thus withdrew the partial credit it had made against the overdraft, and transferred the whole amount of the overdraft to White without reduction. The sale of the bonds having been unauthorized, Strong had the right, on becoming informed of it, to elect whether to ratify it and claim the benefit of the surplus in reduction of the overdraft, or to repudiate the sale and the credit of the surplus, and hold the bank responsible for the bonds. He made the election, and disaffirmed the sale, thereby rejecting the proposed credit on account of the overdraft. The result of this was to leave him indebted in the full amount of the overdraft, and to preserve intact his claim to the bonds. White, as the assignee of the bank, was thus vested with a right of action against Strong for the whole amount of the overdraft, and Strong, having rejected the sale of the bonds and the credit, precluded himself from setting up this credit against White, should he bring an action for the recovery of the overdraft.

It is true that the bank failed to obtain payment in full of the indebtedness of Strong. It sold its claim of \$53,779.89 for the sum of \$34,787.50. It voluntarily sacrificed the difference between these two sums, rather than incur the hazard of a greater loss.

It appears that White was not willing to purchase part of the claim, but insisted on having the whole, and by assigning the whole the bank obtained \$34,000. The bank therefore had the benefit of the sale to White, on the whole claim for the overdraft, and although it sold this claim for less than its face, it should not be permitted to make a double use of any portion of it. Its rights are the same in this respect as though it had sold the claim for its full face.

By this sale and transfer the bank rendered Strong (unless he chose to ratify the sale by the bank) responsible to White for the full amount assigned to him, and debarred itself from using any part of the assigned claim as an offset against its liability to Strong on the bond transaction.

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Strong might have ratified the sale of the bonds and the credit given for the surplus, and in that event would have been entitled, even as against White, to insist upon the credit resulting from such sale, inasmuch as White took, subject to all equities.

But the sale having been unauthorized, the bank having, by its dealing with White, revoked the credit made in reduction of the overdraft, and Strong having, as he had the right to do, repudiated the sale of the bonds, and thus disclaimed the credit of the proceeds, he remained liable to White for the full amount of the overdraft, and was entitled to demand of the bank the bonds or their value, on paying the \$15,000 and interest for which they had been pledged.

There is no exception which raises any question as to the time as of which the value of the bonds should have been computed for the purpose of assessing the plaintiff's damages.

The interest of Todd in the bonds cannot avail the defendant. Nine thousand five hundred dollars of the bonds were pledged by Todd to Strong and Hibbard, who in turn pledged them with others to the bank. Todd consented to the transfer of this account to Strong. Strong thus became entitled to redeem the bonds from the bank, and so long as the advance which had been made to Todd remained unpaid, was entitled to hold the bonds of Todd as security for that advance. Strong had a special property in the bonds, which entitled him to maintain the action. No defect of parties is set up in the answer. The judgment should be affirmed with costs.

All concur.

Judgment affirmed.

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Statement of case.

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MARIA D. SANFORD, Respondent, v. WILLIAM A. SANFORD,  
Appellant.

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If one loaning money takes a promissory note therefor, payable to the order of himself and his wife, this imports a gift to the wife in case she survives him, and delivery of the note to her by the husband is not necessary to perfect the gift.

During the husband's life such note remains subject to his control, and the wife has no legal interest therein until his decease.

In an action upon such note, brought against the maker by the wife, after death of the husband, the maker being an executor and the wife the executrix of his will, evidence that a legacy to the wife was intended in lieu of the note; that such intended provision was with her knowledge and consent, and that she had produced the note to the appraisers and included it in the inventory as assets of the testator, is competent for the defence, to show that she is not "the real party in interest."

The maker, on becoming an executor, is as well entitled to hold the note, if assets, as the plaintiff; nor can she, by an action at law, compel him to pay it into her hands.

(Argued May 29th; decided June 22d, 1871.)

APPEAL from an order of the General Term of the Supreme Court in the fourth district, affirming a judgment for the plaintiff, entered upon the report of Hon. A. B. James, sole referee.

The following facts were found by the referee: Joseph H. Sanford died in 1866, leaving the plaintiff his widow. In June, 1864, he had loaned to the defendant, who was one of his sons, \$5,000 of his own money, and taken from him a promissory note therefor, with interest, payable to the order of Joseph H. and Maria Sanford. Before his death, a committee of his estate had been appointed, under a commission *de lunatico*, to whom the plaintiff, in delivering his personal property, had delivered this note.

By his will, which was duly admitted to probate, the plaintiff and the defendant and another son were named executrix and executors, all of whom accepted, qualified, and entered upon the discharge of that trust.

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Statement of case.

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During his life he kept the note in his possession and received several payments thereon, and his committee received two payments thereon. After his death the committee handed this note to the plaintiff, as executrix. The action is by the plaintiff, in her own name, for a balance of some \$4,800 due on the note.

On the trial the defendant offered to prove, that the deceased had intended to bequeath this note to the plaintiff, but, it being suggested that there might be some question about such a bequest, and that it would be better to bequeath a certain sum in lieu of it, and after consultation with the plaintiff, he directed the insertion in his will of a bequest to the plaintiff, among other things, of \$10,000, in lieu of the note, which was done, and the will so drawn is the will admitted to probate. This was objected to as immaterial; that the form of the note must control the rights of the parties, and that a recovery can only be defeated by proving that deceased reduced the note to possession in his lifetime, as it is an executory contract, which objection was sustained.

The will was put in evidence, and contained this clause, after the bequests to the plaintiff: "All of which is to be accepted and received by her, in lieu of dower and every and all claims on my estate."

The defendant offered to prove, that after the executors and executrix had qualified as such, the plaintiff signed a receipt, as executrix, acknowledging that she had received the note from the committee, as part of the personal assets of the testator. This was also objected to and excluded.

The defendant also offered to prove that the plaintiff, as executrix, produced the note to the appraisers as part of the personal estate of the deceased for appraisal, and the same was so appraised. This was also objected to as immaterial, and excluded.

The defendant also offered in evidence the inventory, made by the appraisers and executrix, showing the note inventoried and appraised as part of the personal estate of deceased, which was excluded on the same objection.

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## Statement of case.

The referee found, as conclusions of law :

1st. The action properly brought in the name of the plaintiff as surviving payee.

2d. The defendant "is not in a position as sole defendant in this action, to set up the legal or equitable rights of the estate of Joseph H. Sanford, deceased, to the said note or its proceeds, if any such rights exist; that such rights can only be determined when all the proper parties are before the court."

3d. That the plaintiff have judgment.

*Leslie W. Russell*, for the appellant, insisted that the plaintiff was not the real party in interest under section 111 of the Code, citing *Houghton v. McAuliffe* (26 How., 270); *Clark v. Philips* (21 How., 87); *Eaton v. Alger* (57 Barb., 179); *James v. Chalmer* (2 Seld., 214); *Killmore v. Culver* (24 Barb., 656); *Dewitt v. Brisbane* (16 N. Y., 509); *Snider v. Ridgway* (49 Ill., 1 Alb. L. J., 336). That defendant, as executor, is bound to protect the estate, and payment to an unauthorized person would not protect him. (*Decker v. Miller*, 2 Paige, 149; *Smith v. Lawrence*, 11 id., 206; *Dayton*, 549.) The evidence offered was proper to rebut any presumption of a gift of the note to the wife. (*Borst v. Spelman*, 4 N. Y., 288; *Rom. C. Asylum v. Strain*, 2 Bradf., 34; *Scott v. Simes*, 10 Bosw., 314; *Craig v. Craig*, 3 Barb. Ch., 78; *Jaques v. Short*, 20 Barb., 269; *Brown v. Brown*, 23 id., 565; *Geary v. Page*, 9 Bosw., 290; *Kingdon v. Bridges*, 2 Vern., 67; *Glaister v. Hewer*, 8 Ves., 99; *Bryant v. Bryant*, 42 N. Y., 17; *Smith v. Maine*, 25 Barb., 34.)

*Edward C. James*, for the respondent, cited *Borst v. Spelman* (4 N. Y., 288); *Draver v. Jackson* (16 Mass., 479); *Roman Catholic Orphan Asylum v. Strain* (2 Bradf., 34); *Christ's Hospital v. Budgin* (2 Vernon, 683); *Dummer v. Pitcher* (5 Simons, 35); *Scott v. Simes* (10 Bosw., 314); *Richardson v. Daggett* (4 Vermont, 336); *Briggs v. Beach* (18 Vermont, 115); *Schoonmaker v. Elmendorf* (10 Johns., 49);

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*Craig v. Craig* (3 Barb. Ch., 78); *Jaques v. Short* (20 Barb., 269); *Coates v. Stevens* (1 Yo. & Coll. Exqr. R., 66); *Kingdon v. Bridges* (2 Vern., 67); *Glaister v. Hewer* (8 Vesey, 199); *Day v. Pargrave* (cited in 2 M. & S., 396); *Gaters v. Madelcy* (6 Mees. & W., 423); *Scarpellini v. Atcheson* (7 Adol. & El., N. S., 864); *Nash v. Nash* (2 Mad C. C., 133); *Cheekly v. Cheekly* (2 Shower, 247); *Howard v. Okes* (3 Wels. H. & G., 136); *Allen v. Wilkins* (3 Allen, Mass.); *Gibson v. Todd* (1 Rawle, Penn.); 1. Rolle Ab., 342; Bar. & F. D., id., 349; *Demlyn v. Brown* (Moore, 889); *Coppin v. ———* (2 P. Wms., 496); *Datton v. Midland R. R. Co.* (20 Eng. L. & E., 273); *Richards v. Richards* (2 B. & Ald., 447); Reeves' Dom. Rel., 132; *Hoy v. Rogers* (4 Monroe, Ky.); *Mann v. Mann* (14 Johns., 11); *Charter v. Charter* (41 Barb., 525); *City Bank of New Haven v. Perkins* (29 N. Y., 568); *Brown v. Penfield* (36 N. Y., 475).

PECKHAM, J. The note being payable to husband and wife jointly, belonged to the wife as survivor. (*Borst v. Spelman*, 4 N. Y., 288; *Draper v. Jackson*, 16 Mass., 480.) This is so, though the consideration was paid by the husband, if there are assets sufficient without this money to pay defendants. (*Christ's Hospital v. Budgin*, 2 Vern., 683; *The R. C. Orphan Asylum v. Strain*, 2 Brad. R., 34; *Scott v. Simes*, 10 Bosw., 314; *Dummer v. Pitcher*, 5 Simons, 35; and other analogous cases; *Schoonmaker v. Elmendorf*, 10 J., 49; *Craig v. Craig*, 3 Barb. Ch. R., 78; 4 Bright's Husb. and Wife, by Lockwood, 32; and cases cited.)

Taking this note in the name of himself and wife shows that the husband intended thereby to give it to her, in case she survived him, and a delivery to her was unnecessary to perfect the gift.

Assuming this to be so, yet during the life of the husband the note is subject to his control and disposition. The wife has no legal interest in it until his decease.

In this case the defendant offered to prove substantially that, by an arrangement between the husband and wife, he had

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given to her by his will a legacy of more than double the amount of this note, in lieu of the note; that that contract or arrangement had been fully executed on his part, and that after his decease she had executed it on her part by receipting the note to the committee of her deceased husband as part of the assets of his estate; by delivering the note to the appraisers of his estate as a part of his assets, and by her placing it upon the inventory as belonging to his estate.

This testimony was objected to, and it was rejected by the court, not upon the ground that it did not show that the plaintiff, the surviving wife, was not the owner of the note, but that she could maintain this action though she was not the owner. "That the defendant was not in a position to set up the legal or equitable rights of the estate of his father, J. H. Sanford, to the note, or to its proceeds; that such rights could only be determined where all the proper parties were before the court."

There were some other objections and positions taken at the trial, but they are not urged here.

The Code declares that "every action must be prosecuted in the name of the real party in interest," except as specified in section 113. (Code, § 111.) It is not claimed that the plaintiff comes within the exception of being a trustee of an express trust. Hence it is not necessary to refer to that.

How, then, can this action be maintained in the name of this plaintiff, when she does not own the note—when she is not the "real party in interest?"

The plaintiff insists that the defendant has no right to question the plaintiff's title; that so long as he owes the demand, and no other person sets up any claim or forbids the payment, he is bound to pay the person who has the note in possession, so long as he does not hold it in bad faith.

*The City Bk. of N. Haven v. Perkins* (29 N. Y., 568) gives some sanction to this doctrine, in the language of the judge delivering the opinion. That case and the later case of *Brown v. Penfield* (36 N. Y., 475) were undoubtedly well decided. They are in entire harmony with the Code. For

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any dicta going beyond the cases, no one is responsible except the learned judges who made them.

They referred to a case in 15 Wendell, 640, of *Gage v. Kendall*, for the rule as to the person who might maintain the action, and that if he were not the owner he might sue as trustee for the real owner. But this had no application to the Code, which prescribes the present governing rule. That is, he must be "the real party in interest," except in the excepted cases.

It is insisted here that the defendant did not offer to prove that the plaintiff accepted the provision made for her in the will in lieu of the note. He did not make that offer in terms. But the testimony he did offer, that the provision was made in lieu of the note, after consulting with the plaintiff and with her knowledge and consent, and that after his death she treated the note in every respect as belonging to the estate of her husband and not to herself, is strong evidence of her acceptance of that provision; strong evidence that the note then was the property of the estate and not hers. It would have warranted a verdict to that effect, if left uncontradicted. Hence the offer was sufficient. No question of the solvency of the estate was made at the trial. Besides, insolvency is not to be presumed.

It is said that the defendant owes this note, and why should he not pay it to the plaintiff?

But he owes it to the estate of his father, and not to the plaintiff, and he represents that estate as much as the plaintiff. This is part of the assets of the estate. Why are they not as safe in the hands of one executor as of another? It is not pretended they are not. Why has he not as much right to hold them as either of the other representatives? It may be that his interest in the estate is much larger than hers. Why, then, should she insist upon taking this money into her hands?

If this money be needed for the proper settlement of the estate, and the defendant refuses to apply it, his co-executors could compel him to pay the note by application to equity

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Statement of case.

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powers of the court, and then the court could properly apply the money. (*Smith v. Lawrence*, 11 Paige, 206-209.)

Judgment reversed. New trial ordered, costs to abide the event.

All concur, except ALLEN, J., not voting.

Judgment reversed and a new trial granted.

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IN THE MATTER OF WIDENING AND IMPROVING NINTH AVENUE  
AND FIFTEENTH STREET, in the city of Brooklyn.

THE BROOKLYN PARK COMMISSIONERS, Respondents, *v.* CHARLES  
A. NICHOLS and others, Appellants.

Where lands owned by a city in fee, to be held for the purpose of a public park, are taken for the purpose of widening public streets, under an act of the legislature (Laws 1869, ch. 700, p. 1658), providing for an assessment and payment of the damages sustained by the owners of lands taken for such improvement, the city is entitled to compensation for the land so taken. (ALLEN and FOLGER, JJ., *contra*.)

It cannot be held, as matter of law, that the lands embraced in a park are of no more value to the city than the same lands when devoted to the public use as streets, and an award of the damages sustained by the city, by reason of such conversion of park lands into streets, having been confirmed by the Supreme Court, in the absence of any legal error, is conclusive.

(Argued June 6th ; decided June 22d, 1871.)

APPEAL from an order of the General Term of the Supreme Court, in the second judicial department, affirming an order of the Special Term for the county of Kings, confirming the report of commissioners of estimate and assessment.

The act of May 7, 1869 (Laws 1869, ch. 700, p. 1658), directs that Ninth avenue and Fifteenth street, in the city of Brooklyn, be widened and opened, under the supervision of the Brooklyn park commissioners.

By section 2, commissioners of estimate and assessment are to be appointed by the court, who are directed to esti-

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Statement of case.

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mate the expense of such widening and opening, together with the amount of damages to be sustained by the owners of land taken for the opening, as well as by all other persons to be affected thereby.

By section 4, they are to assess the same as they shall deem just and equitable, upon land to be in their judgment benefited by the improvement. Three-fifths of what relates to Ninth avenue is to be charged upon the park side of the avenue, and two-fifths on the other side. The whole of the land required for the widening of Ninth avenue is taken from the park.

The report of the commissioners on valuation is made up in the tabular form required by the act, and includes an allowance for the strip of land taken from the park on Ninth avenue, and for another strip taken from the park for the widening of Fifteenth street. From the ruling of the commissioners in respect to this allowance, an appeal was taken to the Supreme Court, but confirmed by Justice GILBERT, and on a further appeal the order was affirmed at General Term.

The report contains a column of "the names of persons interested in the property taken for the improvement, with a statement of their respective interests therein;" and under this heading appears the following entry or award for the parcel (A) of land taken from the park for the widening of Ninth avenue. .

"The city of Brooklyn, an estate in fee. The commissioners of the sinking fund of the city of Brooklyn; to be applied to the redemption of park bonds, \$66,457. Said parcel (A) is subject to a public servitude as part of Prospect park."

And so far as relates to the land taken for the widening of Fifteenth street, parcel 45, the entry in said report under the same heading is; "The city of Brooklyn, an estate in fee. The commissioners of the sinking fund of the city of Brooklyn; to be applied to the redemption of park bonds, \$41,022. Said parcel 45 is subject to a public servitude as part of Prospect park."

Opinion of the Court, per GROVER, J.

*Joshua M. Van Cott*, for the appellants, cited *People v. Kerr* (27 N. Y., 192); *Darlington v. The Mayor* (31 id., 164); *Albany and N. R. R. v. Brownell* (24 id., 345); *East Hartford v. Hartford Bridge Co.* (10 How. U. S., 111); *Matter of Albany St.* (11 Wend., 149); *Stebbins v. The Metropolitan Board of Works* (L. R. 6 Q. B., 37); *Matter of Central R. R.* (1 Kern., 276); *Matter of Canal and Walker Streets* (2 id., 406); *King v. The Mayor* (36 N. Y., 186).

*Samuel Hand*, for the respondents.

GROVER, J. It was for the legislature to determine whether the expense of widening Ninth avenue and Fifteenth street, in the city of Brooklyn, should be paid by the city at large, or assessed upon the property benefited by the improvement; and in case of adopting the latter mode, to provide for the assessment of such property in proportion to the benefit received. (*Litchfield v. Vernon*, 41 N. Y., 123.) To effect this, section three of the act (Laws of 1869, vol. 2, 1659), provides that, before any assessment for such widening and opening is made, the park commissioners shall, by resolution, fix a district of assessment, beyond which the assessment to liquidate and defray the expenses and damages incident to said widening and opening and the subsequent improvement thereof shall not extend. Section two provides for the appointment of commissioners, by the Supreme Court, to estimate the expense of such widening and opening, and the amount of damages to be sustained by the owners of land and all other persons affected thereby, and to apportion and assess the same as directed by the act. Section four provides that the commissioners shall estimate the expenses and damages occasioned by the said improvement. And after their report thereon shall have been confirmed, they shall apportion and assess the same as they shall deem just and equitable, upon the lands and premises in their judgment benefited by the improvement within the district so limited by the park commissioners, and that in making the assessment for

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Opinion of the Court, per GROVER, J.

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widening and improving Ninth avenue, they shall apportion and assess three-fifths of the expense and damage upon lands lying south-east of said avenue, and the remaining two-fifths thereof upon land lying north-west of said avenue. The only error of the commissioners complained of by the appellants, is the assessment in favor of the city of the value of the land taken from the park for the purpose of widening the street and avenue. This complaint is not that such land has been overvalued by the commissioners, if the city, as owner, was entitled to payment of the value, but they claim that the city was not entitled to such payment, but only to nominal damages at most, therefor. By the acts of the legislature, under which the lands included in Prospect park were acquired by the city of Brooklyn, the city became the owner of such lands in fee, to be held by it for the purposes of a public park. The city cannot dispose of, or use the lands for any other purpose, without the sanction of the legislature; but with such sanction, the city may dispose of or use them in any way it may deem proper. (*Brooklyn Park Com. v. Armstrong*, decided by this court, March, 1871, *ante*, p. 234.) No question is made by the counsel for the appellant, but that the legislature may authorize the taking of the land from the park for the purpose of widening the street and avenue. The statute provides for the assessment of the damages sustained by the owners of the land taken for the improvement, and others who may be affected thereby. The city was the owner in fee of the land in question, charged with a trust to use the same for a park only. The legislature provided for the payment of the expenses of the improvement by an assessment upon the land especially benefited thereby. From the act and the map produced, it appears that the lands of the city embraced in the park were subject to an assessment for benefit in like manner as those of any other owner. Its land only was taken for widening the avenue, and the act provides for the assessment of three-fifths of the expense upon the lands of the city embraced in the park and two-fifths upon the lands of owners upon the opposite side of the avenue.



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Opinion of the Court, per GROVER, J.

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This shows an intention of placing the lands of the city embraced in the park upon the same footing in respect to the improvement as those of any other proprietor. An assessment of the damages sustained by the city, by the taking the strip from the park for widening the avenue, must have been intended, otherwise there would have been no land to appraise, and the provision therefor would have been nugatory. It follows that the city, under the act in question, was entitled to compensation for the lands taken for the improvement. It is unnecessary to determine whether the legislature could have authorized the taking of the land from the park for a street without compensation, as it clearly has not done so. On the contrary, it has provided that compensation should be made for the lands taken, and that such compensation should be assessed upon and paid by the owners of the land benefited, including those of the city. This brings us to the question principally argued by the counsel for the appellant. He insists that, the lands being held by the city in trust for a park for the use of the people of the city, the only damages that could be assessed was the pecuniary loss, if any, sustained by the city by the change of the use to a street instead of a park, and that this at most was merely nominal. To sustain this position the counsel relies upon the well settled rule that, where lands are taken for public use, the owner is only entitled to compensation for the loss or damages caused to him by such taking. This principle has been applied where the land was already subject to a servitude in behalf of the public and an additional servitude was imposed upon it. It has accordingly been held in such cases that the owner of the fee was only entitled to compensation for the loss or injury, if any, sustained by subjecting the land to the additional servitude, or in case the fee was taken for public use, he was only entitled to the value subject to the servitude already charged thereon. This is so well settled that a citation of the authorities is unnecessary. It cannot be questioned that the intention of the act was to compensate the city for any loss sustained by converting park lands into streets, nor but that the legislature had

power to provide that it should be so compensated, but it was designed only to make compensation for the loss. To this extent only were damages to the city to be assessed. To sustain the position of the defendant's counsel, it must be held as matter of law, that the lands embraced in the park, that can only be used for park purposes, are of no more value to the city than the same lands devoted to the public use as streets. I am not aware of any principle upon which such a legal conclusion can be based. The lands embraced in the park have, under the authority of the legislature, been acquired by the city at very great expense for park purposes. To hold as a legal conclusion that such lands so to be used are of no more value to the city than the same lands laid out into and used as avenues and streets would be, I think, absurd. It must be so held, or the award of the commissioners in favor of the city must be sustained. If the city sustained any substantial loss by the taking of the land from the park and converting it into streets, it was for the commissioners to ascertain and determine the amount of such damages. Their report, when confirmed by the Supreme Court, became conclusive, unless some rule of law was violated by them. Even had this court the power to review the correctness of their determination as to the sum to be awarded to the city, there is nothing in the case showing any error committed by them in this respect. No such point was made by the counsel for the appellant. His claim is that the city is not entitled to any compensation in consequence of the new use to which the land was devoted. But it is said that the improvement was designed for the benefit of the park, by creating a fine promenade and drive exterior to this portion of it, and not for the benefit of the owners of the lands upon the opposite side of the street, and that it would, therefore, be unjust to assess the latter for the lands taken from the park for that purpose. This argument should have been addressed to the legislature. That body has deemed the improvement beneficial to both, and has therefore provided that the owner should be compensated for the land taken, and that each

should contribute to the payment of such compensation, in proportion to the benefit respectively received, declaring, in substance, that such portion, so far as the avenue was concerned, should be as three to two, thus relieving the private owners to that extent, which was as far as the legislature deemed just. It should be borne in mind that the city has, with the sanction of the legislature, the right to dispose of the park land for any purpose, and that, without such sanction, it has no right of disposition whatever. The act providing that the land in question may be taken for streets upon compensation to the city, as provided therein, is the sanction required, and the conditions thereby imposed must govern the rights of the parties. If the appellants are injured by being compelled to contribute for an improvement not beneficial to them, but which the legislature has so declared, the court cannot redress such injury. No question arises upon the facts presented as to the rights of the holders of bonds issued by the city, in respect to a lien upon the lands in question to secure payment of such bonds.

CHURCH, Ch. J., PECKHAM and ANDREWS, JJ., concur; ALLEN and FOLGER, JJ., dissent; RAPALLO, J., not voting.

Order affirmed.

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ORVILLE ODDIE et al., Respondents, v. THE NATIONAL CITY  
BANK OF NEW YORK, Appellant.

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When a genuine check, drawn by one of its customers upon a bank, is presented by the drawee to that bank for deposit, it is substantially a demand of payment by the holder of the check. If the bank accepts the check and pays it, either by delivering the currency, or giving the party credit for it as a deposit, the transaction is closed between the bank and such party. And where the amount of a check, so presented, was credited to the holder upon his deposit ticket by the officers of the bank.—*Held*, the bank became liable for the amount of the check, although on the same day, and before the close of banking hours, but after it had paid other checks of the drawers presented later, it returned the check to the depositor as not good, and although the account of the drawer was overdrawn at the time of the deposit.

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Statement of case.

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In the case of a deposit of a check drawn upon itself, the bank becomes at once the debtor of the depositor, and the title to the deposit passes to the bank.

(Argued May 29th; decided June 6th, 1871.)

APPEAL from the judgment of the General Term of the Supreme Court, in the first judicial district, affirming a judgment entered on the report of a referee, in favor of the plaintiffs, for \$19,457.91. The findings of fact were as follows:

The defendants, at the times and dates hereinafter mentioned, were a banking corporation, doing business at the city of New York, where their banking house is situated. The plaintiffs kept their bank account with the defendants, making large and numerous deposits, and drawing numerous checks daily.

For the purpose of accommodating the plaintiffs, their pass-book, with a ticket or list of the items of the first deposit was received at the bank, soon after the opening of banking hours, and they were allowed to send in other deposits at their pleasure during the day, which were received by the receiving teller and listed on the plaintiffs' deposit ticket. After banking hours, the plaintiffs usually delivered to the bank another deposit ticket or list of all the deposits made during the day, when the whole was entered in one sum in the plaintiffs' pass-book. On the 15th day of May, 1869, at about five minutes before two o'clock, p. m., the plaintiffs delivered to the receiving teller of the defendants, at their banking house, for deposit, two checks for \$18,237.50 each, one made by Frank Work & Company, and the other by Davis and Akin. The check of Davis and Akin was drawn on the defendant's bank, and was payable to the order of plaintiffs, and was indorsed in the name of the plaintiffs by a clerk acting under a power of attorney. An assistant of the receiving teller put a stamp on the back of the check in a few minutes after it was delivered to the bank, certifying to the correctness of the indorsement of the check under the power of attorney of the plaintiffs.



## Statement of case.

immediately after, and at about two minutes after three o'clock P. M., of that day, again presented the check to the receiving teller at the banking house of the defendants, tendered it to the said receiving teller and demanded that he should receive it on deposit as money, which the receiving teller declined to do, and refused to receive it. The said check was not presented by the plaintiffs to the paying teller for payment or certification as "good," before its delivery to the receiving teller for deposit.

Davis and Akin were regular depositors and kept their bank account with the defendants' bank. Their account remained overdrawn at the close of the banking hours on the 15th of May last, in the sum of \$37,351.29, and has never been made good. The defendants have sold some securities held by the bank belonging to Davis and Akin, and have applied the proceeds to the credit of their account, thereby reducing the amount of their overdraft to about \$14,000, which sum still remains due and unpaid to the said bank, exclusive of the said check to the order of the plaintiffs for \$18,237.50. The last deposit of Davis and Akin was for \$52,050, made at about a quarter after two o'clock P. M., on the said 15th day of May, 1869.

The check of Davis and Akin was given to the plaintiffs for full value received from them at the time of the delivery thereof to the plaintiffs.

*William Henry Arnoux*, for appellant. On the question of the transaction of banking business. (*Boyd v. Emerson*, 2 Ad. & E., 184; *Harker v. Anderson*, 21 Wend., 376; *F. and M. Bank, v. B. and D. Bank*, 16 N. Y., 125; *Nellis v. N. Y. C. R. R. Co.*, 30 N. Y., 505, 518; *Swinnerton v. Columbian Ins. Co.*, 37 N. Y., 174; *Smedes v. Utica Bank*, 20 John., 378; *Ere v. McDowell*, 14 Ir. C. L. R., 314.) On the question of demand. (*Downes v. Phenix Bank*, 6 Hill, 297; *Walrath v. Thompson*, 6 Hill, 540; Affirmed, 2 N. Y., 185; *Sears v. Patrick*, 23 Wend., 528; *Taylor v. Bates*, 5 Cow., 376; *Ferris v. Paris*, 10 John., 285; *Carroll v. Cone*, 40 Barb.,

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220; *Jeffries v. Sheppard*, 3 Barn. & Ald., 696; *Edwards on Bills*, 675; *Byles on Bills*, 337; *Williams v. Mathews*, 3 Cow., 252; *Garvey v. Fowler*, 4 Sandf., 665; *Burgh v. Legge*, 5 Mees. & W., 418; *Carter v. Flower*, 16 Mees. & W., 749; *Harris v. Richardson*, 4 Car. & P., 522; *Terry v. Parker*, 4 Ad. & E., 502; *Kemble v. Mills*, 1 Man. & Gr., 757; *Custis v. State Bank*, 6 Blackf., 312.) On the question of estoppel. (*Sparrow v. Kingman*, 1 N. Y., 242, 246; *Willard Canal Co. v. Hathaway*, 3 Wend., 480; *Fox v. Heath*, 16 Abb., 163; *Shapley v. Abbott*, 42 N. Y., 447; *Dezell v. Odell*, 3 Hill, 215; *Plumb v. Cattaraugus Ins. Co.*, 18 N. Y., 392; *Truscott v. Davis*, 4 Barb., 495; *Martin v. Angell*, 7 Barb., 406; *Otis v. Sill*, 8 Barb., 102.)

*Noah Davis*, for respondents, cited *Matter of Franklin* (1 Paige, 249); *Commercial Bank v. Hughes* (17 Wend., 94); *Carroll v. Cone* (40 Barb., 222); *Marsh v. Oneida Central Bank* (34 Barb., 298); *Pratt v. Foote* (9 N. Y., 463); *Dezell v. Odell* (3 Hill, 215, and cases there cited); *Broom's Legal Maxims*.

CHURCH, Ch. J. The referee found that, about five minutes before two o'clock, the plaintiffs delivered to the receiving teller of the defendants, for deposit, the check in question, which was drawn by a customer of the defendants upon them, and that the receiving teller entered it on the deposit ticket of the plaintiffs. These facts are sufficient to sustain the conclusion of the referee, that the defendants paid the check by receiving it as a deposit of money from the plaintiffs, and it is not material whether this is to be regarded as a conclusion of fact or of law, or whether it is stated under the findings of fact or conclusions of law. This finding is corroborated by the fact that, subsequent to the receipt and entry of this check, the defendants continued to pay the checks of Davis and Akin, and also to certify their checks, although their account was in fact overdrawn. These facts throw light upon the intention of the defendants to receive this check as a deposit, and to

take the risk of the account being made good by subsequent deposits, or of an indemnity from collaterals which the bank held, and the evidence was competent for that purpose.

It is insisted, however, that the presumption of law is, that the defendants were justified in regarding the check as deposited with them, as plaintiffs' agents to collect, and that they are not liable if they used due diligence; and we were referred to the case of *Boyd v. Emmerson* (2 Ad. & El., 184) as an authoritative decision to sustain this position, which, it is said, has never been overruled, and has been approvingly cited in this State. I have carefully examined that case, and I find it lacks a very material element to make it an authority in this case, and that is, that the bank in that case did no act and its officer said nothing indicating an intention or assent to receive the check on deposit. The customer laid the check on the counter while the clerk was making an entry in the books relating to other business of the customer, saying "place this to my account," and left the bank. The clerk said nothing, and did not see the check until after the customer had left the banking house, and did not "debit the drawer with the amount or credit plaintiff with it, or cancel the check."

The court placed its decision upon this distinction. Lord DENMAN, Ch. J., said: "I think the statements in the declaration, that in consideration of the check being delivered up to the defendants, they promised to pay the amount or to allow the plaintiff credit for it, are not proved. If they did so promise, undoubtedly they became holders to his immediate use, but I think that what passed at the time of the presentment was, at the very least, equivocal. \* \* \* If, on delivering the check, he had said at once, 'cash me this check,' or 'give me credit for it,' he must have drawn from Reader a distinct answer; but by merely saying 'place this to my account,' he leaves it upon the usual terms, and subject to the contingencies to which bills or checks so paid in are liable, and if he received notice of dishonor in proper time it was sufficient." The other judges placed their decision upon the same ground. It is unnecessary to determine how we should regard such a



transaction. It is enough that the decision is not an authority for the defendants' position in this case. That case was cited approvingly in *Harker v. Anderson* (21 Wend., 376), upon the point that when paper is thus received for collection, notice of dishonor the next day is in time, and not for the position now claimed for it.

The presumption of law invoked by the defendants cannot be indulged in against the evidence. Here the plaintiffs clearly put in the check as a deposit, and the defendants as clearly received it as such, and credited the plaintiff with it. The credit on the deposit ticket was as significant an act, evincing the consent of the defendants to the payment of it, as if made upon the pass-book of the plaintiffs, and entered upon the books of the bank.

Financial business is transacted at banks in large amounts, with great rapidity, but according to definite and certain rules, which are well understood and acted upon by those engaged in that business. Very little is said, but very much is understood, and there is an absence of all formalities which tend to embarrass the facility of doing the business.

In determining the legal effect of such transactions, we must apply the same rules applicable to all contracts and business affairs, and effectuate and carry out the intention of the parties, to be gathered from their acts and declarations, and the accustomed and understood course of the particular business. Applying these rules, there can be no doubt but there was an express demand on one side, and consent on the other, that this check should be placed to the credit of the plaintiffs as a deposit. The legal effect of the transaction was precisely the same as though the money had been first paid to the plaintiffs, and then deposited. When a check is presented to a bank for deposit, drawn directly upon itself, it is the same as though payment in any other form was demanded. It is the right of the bank to reject it, or to refuse to pay it, or to receive it conditionally, as in *Pratt v. Foote* (9 N. Y., 463), but if it accepts such a check and pays it, either by delivering the currency, or giving the party

credit for it, the transaction is closed between the bank and such party, provided the paper is genuine.

In the case of a deposit, the bank becomes at once the debtor of the depositor, and the title of the deposit passes to the bank. The bank always has the means of knowing the state of the account of the drawer, and if it elects to pay the paper, it voluntarily takes upon itself the risk of securing it out of the drawer's account or otherwise. If there has ever been any doubt upon this point, there should be none hereafter. A different principle would be applied to checks drawn upon other banks, or paper left for collection. In such cases the presumption of agency might arise.

Some stress was laid upon the circumstance that the check was presented to the receiving instead of the paying teller, but it is not claimed but the receiving teller had the authority to receive deposits, and to determine what checks upon the bank it would receive, and the depositor is not to be prejudiced by his misjudgment, or want of information even, as easy access to such information was within his reach; but there was no want of full knowledge on the part of both tellers that the drawer's account was overdrawn largely at the time.

The officers of the bank doubtless believed that he would make his account good. At all events, they assumed the responsibility, and the bank is bound by their action. (2 Keyes, 254; 23 N. Y., 335.) I think, also, that the defendants are estopped from claiming that they did not receive the check upon deposit. They entered it and acted with it as a deposit. The plaintiffs relied upon and acted upon the strength of the acts and admissions of the defendants. The claim now set up is inconsistent with the acts and declarations of the party, and the plaintiffs have been injured by being deprived of the opportunity of retaining the check and reclaiming the consideration, or otherwise securing themselves, until the drawers had failed and run away. It is true, that the time in which the plaintiffs would have had this opportunity was short, from two to three o'clock; but it

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Opinion of the Court, per CHURCH, Ch. J.

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appears that during that period the drawers continued to transact business and draw checks upon the defendants' bank, and made deposits therein to a large amount, in one item of over \$50,000. Under these circumstances it would be inequitable and unjust to permit the defendants to throw the responsibility of their own acts upon the plaintiffs, and the law has established a rule which forbids it. Every element of an *estoppel in pais* exists in this case. (*Dezell v. Odell*, 3 Hill, 215.)

It is urged that no demand of this money has been proved. A demand in some form is undoubtedly necessary in an action for money had and received against bankers and others holding the money in a fiduciary capacity. (*Downes v. Phoenix Bank*, 6 Hill, 297.)

It seems that the check was handed by the defendants to the plaintiffs' messenger at about three o'clock, with a request that he would call upon the drawers to make it good, which he did without success, and then delivered it to the plaintiffs, one of whom immediately, and within two minutes after three o'clock, took it to the defendants, and claimed that they had received it as a deposit, and were bound to credit the plaintiffs with the amount upon their books, which they refused to do, and refused to accept the check from their hands. This was substantially a demand, and so understood by both parties. The plaintiffs insisted, in substance, that they should be paid the check by having the amount put to their credit upon the books of the bank. The defendants refused, and evidently intended to refuse, payment in any form, claiming that they were not obliged to pay. A check or other more formal demand would have been superfluous.

The judgment must be affirmed.

All the judges concurring, except RAPALLO, J., absent.

Judgment affirmed.

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Respondents, v. THE UNITED  
GRAPH COMPANY, Appellants.

... companies terminated at S., the one leading  
... other from S. to R. Messages passing over the  
... company for transmission beyond S. to R., were  
... and by the latter company. The plaintiff at O. sent a  
... paying for the whole distance.—*Held*, that no partnership  
... money could be inferred from such facts. Each of the com-  
... the absence of evidence of a special agreement or arrangement,  
... with the sender of the message, or between each other, will be  
... for his own acts and for the acts and defaults of the other.

... of damages recoverable for the non-delivery of, or mistake in  
... delivering, telegraphic messages is the natural and necessary consequence  
... of the breach of a contract as contemplated by the parties, interpreting  
... the contract in the light of the circumstances under which, and the know-  
... ing the purposes of the purposes for which, it was made, and when a  
... special purpose is intended by one party, but is not known to the other  
... such special purpose will not be taken into account in the assessment of damages for the breach of con-  
... The damages in such a case will be limited to those  
... ordinary and obvious purpose of the contract.

... respecting the direction, and a consequent misdelivery, is  
... evidence of neglect and want of care in the operator, and  
... of proof upon the company of explaining the error and  
... that occurred without fault.

... was directed to the operator at O., by the plaintiff, to be tele-  
... of plaintiff's agent at R., requesting such agent to telegraph  
... the condition of certain petroleum oil wells at R.,  
... plaintiff, and the operator was informed by the plaintiff,  
... answer was received promptly he should sell the well at  
... which had, to the knowledge of the operator, been offered  
... The ordinary charge was paid for transmitting the message the  
... and it was transmitted to S., and there received by the  
... and by them transmitted over their line to R. By a wrong  
... it did not reach the plaintiff's agent for some days afterward.  
... defendant's agent had no knowledge of the special purpose of the  
... The plaintiff, receiving no response, sold at the offer. It after-  
... appeared that the well was worth, and could have been sold at a  
... price.—*Held*, that the defendant was not liable for this difference,  
... any damages arising from an under sale by the plaintiff.

Argued May 31st; decided June 6th, 1871.)

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Statement of case.

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APPEAL from the judgment of the General Term of the Supreme Court in the fourth judicial district, affirming the judgment of the circuit in favor of the plaintiff for \$1,200 damages.

Action for damages occasioned by the non-delivery, within a reasonable time, of a dispatch transmitted by the plaintiff over the defendant's telegraph lines. The defendant is a corporation formed under the general laws of this State authorizing the incorporation of telegraph companies (Laws of 1848, chap. 265), and at the time of the transactions involved in this action had a line in operation between Syracuse, in this State, and Rouseville, Venango county, Pennsylvania. At the same time, the United States Branch Telegraph Company, a corporation created under the same laws, was in existence as a telegraph company, and had a line in operation between Ogdensburgh and Syracuse. On the 16th of November, 1864, the plaintiffs delivered to the operating agent of the latter corporation at Ogdensburgh a dispatch addressed to Erie Darling at Rouseville, signed by F. B. Baldwin, in these words: "Telegraph me at Rochester what that well is doing." And paid for its transmission to its destination at Rouseville. The plaintiffs proved, under objection, that at the time of handing the message to the operator at Ogdensburgh, they were the owners of an interest in an oil well at Rouseville, and that Darling was their agent to look after lands to which the message related, and that they had received by telegraph, through the same operator, an offer of \$3,800 for the well, and that they then told the operator that F. B. Baldwin, one of the plaintiffs, would go to Rochester by first train and accept the offer, unless the answer to the dispatch showed the property to be worth more; that they wanted to find out if there was anything new in regard to the property; that they wanted to get the dispatch to Rouseville so as to get an answer to F. B. B. at Rochester, to prevent his selling at \$3,800 if there was anything new about the property. One of the plaintiffs testified that he told the operator that he was going to Rochester to

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accept the offer at once, unless he heard by reply to this dispatch that the wells were worth more. Evidence was given tending to prove that the dispatch was delivered from the defendant's office at Rouseville at the residence of Darling, but addressed to "E. R. Cooley," so that it was not received and opened by Darling, for whom it was intended, until several days after its transmission. F. B. Baldwin went to Rochester, and not receiving a reply to the dispatch, after waiting several days, accepted the offer of \$3,800, and sold the property. A few minutes after making the sale he received by telegraph, by the way of Ogdensburgh, a dispatch addressed to him at Ogdensburgh, from Darling at Rouseville, dated November 25th: "Well flowing eighty barrels. New well pumping twenty-five barrels. Can sell your interest for five thousand dollars. Telegraph me refusal for ten days. Have Perry transfer to me." Evidence was also given tending to prove the market value of the property at \$6,000.

The judge at circuit, under the objection and exception of the defendant, ordered a verdict in favor of the plaintiff for \$1,200, and the judgment upon the verdict having been affirmed by the court at General Term, the defendant has appealed to this court.

*Grosvenor P. Lowery*, for appellants, on the question of agency. (*Scothorn v. So. Staffordshire*, 8 Exch., 841; *Muschamp v. Lancaster*, 8 M. & W., 421; *Foy v. Troy*, 24 Barb., 382; *Nescon v. Hamilton*, 2 Drury & Warren, 364; *Bank of U. S. v. Davis*, 2 Hill, 461; *Hargraves v. Rothwell*, 1 Kern., 159, 160.) Reasonable exertions must be made to render the injury as light as possible. (*Hamilton v. McPherson*, 28 N. Y., 72, 76; *Milton v. Hudson R. S. Co.*, 37 N. Y., 210, 214; *Wilson v. Newport Dock Co.*, 4 H. & C., 232.)

*E. C. James*, for the respondents, as to the company's liability, where mistakes occur, and the message has not been

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repeated. (*Sweatland v. Tel. Co.*, 27 Iowa; *Mann v. West. U. Tel. Co.*, 37 Mo., 472; *Camp v. West. U. Tel. Co.*, 1 Met., Ky., 164; Redfield on Carriers, §§ 556, 557.) On the question of damages. (*Leonard v. N. Y., etc., Tel. Co.*, 41 N. Y., 544; *Mesmore v. N. Y. Shot and Lead Co.*, 40 N. Y., 422; *Bryant v. Am. Tel. Co.*, 1 Daley, 547; *Gildersleeve v. U. S. Tel. Co.*, 29 Md.; *Squire v. West. U. Tel. Co.*, 98 Mass., 382; *Wenger v. U. S. Tel. Co.*, 55 Penn., 262; *Griffin v. Colver*, 16 N. Y., 489; Scott & Jarragan on Telegraphs, §§ 387 to 411.)

ALLEN, J. Several questions of more or less importance are presented by the appeal in this action, bringing up as it does, not only the trial and the decisions and rulings therein, but the decisions and judgments of the Supreme Court upon the demurrers to several of the answers of the defendant; but in the view we take of the case, it is necessary to consider but one, as that is decisive of the action, except as it may possibly be maintained for the recovery of nominal damages. The defendant was held liable to special damages, largely in excess of any that would ordinarily be in the contemplation of the parties, or would ordinarily and naturally result from the neglect of duty imputed to the defendant, upon the ground that the Ogdensburgh company, or its agent and operator at Ogdensburgh, was the agent of the defendant in the receipt of the message, and that the latter was chargeable with and affected by knowledge and information possessed by or communicated to the supposed agent, touching the service to be performed, the object and purpose of the message, and the consequences which might result from a non-delivery of it. The defendant has been held liable as upon a special contract, stipulating the damages, in case of failure to perform the required service, at the difference between the actual value of the property contemplated to be sold and the price then offered, and as if the defendant had expressly agreed that, upon a failure to deliver the message to the person to whom it was addressed without delay, the plaintiffs might sell their property at a specified

price, without making further effort to ascertain its value, and the defendants would, as the measure of their liability, pay the loss resulting from a sale at less than the actual value, and this upon receipt of the comparatively insignificant sum fixed and paid for sending ordinary messages; that is, upon payment of the usual fee for the service, without compensation for the extraordinary care and diligence required, or the risk and responsibility incurred, and without knowledge or thought by any one, so far as appears, of the possible extent of such a liability. No ordinary agent and servant could make such a contract in behalf of the company represented or served by him. It would not be within the ordinary scope of his duties, and it would require some evidence of authority or usage of the corporation to sanction and uphold such an agreement as the agreement of the company, and bind it. It is not intended to deny that a corporation is bound by knowledge of and notice to its agent touching the duties of his agency, and that notice to the agent, while employed in the business intrusted to him, and connected with or relating to that business, is notice to the principal, and that the principal will be subjected to all the legitimate consequences of such notice, as if it had been given to him personally. Here, however, the principal has been held liable to damages other than such as result from mere notice of the situation of the parties and the property which was the subject of the message. But passing this question, there was no agency for the defendant, at Ogdensburgh, proved upon the trial. The first connection of the defendant with the message was at Syracuse, and by receiving it from the agents of the Ogdensburgh line, for transmission from Syracuse to Rouseville. Neither the Ogdensburgh company nor the operator of that company at Ogdensburgh was the agent of the defendant for any purpose. It may be conceded, that when the defendant received the message from the other company at Syracuse, it assumed a duty, and came under a liability directly to the plaintiff, and for any omission or neglect of the duty then assumed, the plaintiffs could maintain an action.



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(*Leonard v. N. Y., etc. Tel. Co.*, 41 N. Y., 544; *Squire v. W. U. T. Co.*, 98 Mass., 232.) There was no evidence of any business relation between the two telegraph companies. These lines were co-terminus, the one terminating and the other commencing at Syracuse, and the defendant, as required by law, received messages from the Ogdensburgh company which had been received at Syracuse over the lines of the latter company, to be transmitted to places on the defendant's line. No partnership or mutual agency can be inferred from such terminal relations, and the business transactions resulting therefrom. The statute, under which the two companies became incorporated, required each to receive dispatches from the other, on payment of the usual charges, and to transmit the same. (Laws of 1848, ch. 265, § 11; Laws of 1855, ch. 559.)

A compliance with this act, or the rendering a service which would be a compliance, is not the slightest evidence of any partnership or other business relation between them. It is like the case of several successive carriers of goods over an extended route, each as occasion requires receiving goods from the other for carriage. Each, in the absence of evidence of a special agreement or arrangement, either with the owner of the goods, or between each other, will be liable for his own acts, but not for the acts and defaults of the others. (*Squire v. W. U. Tel. Co.*, *supra*.)

The defendant received the message without notice or information of any fact indicating that extraordinary care or speed in its dispatch or delivery was important or expected, or that extraordinary or special damages would result from any neglect or want of care or accuracy in performing the service. The message did not import that a sale of any property or any business transaction hinged upon the prompt delivery of it, or upon any answer that might be received.

For all the purposes for which the plaintiffs desired the information, the message might as well have been in a cypher or in an unknown tongue. It indicated nothing to put the defendant upon the alert or from which it could be inferred

that any special or peculiar loss would ensue from a non-delivery of it. Whenever special or extraordinary damages, such as would not naturally or ordinarily follow a breach, have been awarded for the non-performance of contracts, whether for the sale or carriage of goods, or for the delivery of messages by telegraph, it has been for the reason that the contracts have been made with reference to peculiar circumstances known to both, and the particular loss has been in the contemplation of both, at the time of making the contract, as a contingency that might follow the non-performance. In other words, the damages given by way of indemnity have been the natural and necessary consequences of the breach of contract, in the minds of the parties, interpreting the contract in the light of the circumstances under which, and the knowledge of the parties of the purposes for which, it was made, and when a special purpose is intended by one party, but is not known to the other, such special purpose will not be taken into account in the assessment of damages for the breach. The damages in such cases will be limited to those resulting from the ordinary and obvious purpose of the contract. (*Cory v. Thames Iron Works*, L. R., 3 Q. B., 181; *Leonard v. N. Y. and B. Tel. Co.*, *supra*; *Messmore v. N. Y. Shot and Lead Co.*, 40 N. Y., 422; *Hadley v. Baxendale*, 9 Exch., 341; *U. S. Tel. Co. v. Gildersleve*, 29 Maryland, 232; *Griffen v. Colver*, 16 N. Y., 493; *Landsberger v. Mag. Tel. Co.*, 32 Barb., 530.) In *Leonard v. A. and B. Tel. Co.*, *Squire v. W. U. Tel. Co.* (*supra*), and *U. S. Tel. Co. v. Wenger* (55 Penn. R., 262), the object of the messages and the purposes of the persons sending them were clearly indicated by the messages themselves, and the damages awarded were such as necessarily and ordinarily attend a failure of the purpose, and would naturally result from the neglect of the telegraph company to perform its duty. Assuming that the answers of the defendant, which had been held bad upon demurrer, and upon which judgment had been given for the plaintiff, were before the court upon the trial so as to make the statements evidence as admissions, a *prima facie* case of

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negligence was made against the defendant. The message had been delivered to the company at Syracuse, properly addressed and directed, and it was delivered at the place of its destination from the office of the defendant misdirected and addressed to a different name, so that it did not reach the person for whom it was intended. This, unexplained, would have authorized a verdict for the plaintiff.

While telegraph companies are not insurers and do not guarantee the delivery of all messages with entire accuracy, and against all contingencies, they do undertake for ordinary care and vigilance in the performance of their duties, and to answer for the neglect and omission of duty of their servants and agents. The nature of the business is suggestive of many risks and contingencies to which no other business or agency is subject. The electric current may be interrupted and the current broken without fault of the corporation, so as to obstruct telegraphic communication, and words of different signification may be represented by characters so similar that errors in transcribing may occur without fault on the part of the person transcribing it, or technical terms may be used not easily expressed by telegraphy, and in which errors may occur without fault. These, and risks of the like character, are upon the person sending the message, unless he elects to comply with the terms of the company, and have the dispatch repeated, by which certain risks are guarded against and errors prevented or insured against. But an error in transcribing the direction, and a consequent misdelivery, are *prima facie* evidence of neglect and want of care in the operator and cast the burden upon the company of explaining the error and showing that it occurred without fault. This is upon the supposition that the message is received for transmission unconditionally. For the purposes of this appeal it is assumed, but not decided, that this message was not subject to the terms and conditions ordinarily attached to the receipt of messages for transmission, but that the defendant is subject to all the liability which legally results from a receipt of a

message and a naked agreement to transmit the same to its destination for a reasonable compensation paid therefor.

If the terms and conditions, ordinarily imposed, were a part of the contract, the question would arise whether the defendant would not be protected against liability for the "error and delay" in the delivery of this dispatch. (See *MacAndrew v. Electric Tel. Co.*, 17 C. B., 3; *Ellis v. Am. Tel. Co.*, 13 Allen, 226.)

The dispatch, not indicating any purpose, other than that of obtaining such information as an owner of property might desire to have at all times, and without reference to a sale, or even a stranger might ask for purposes entirely foreign to the property itself, it is very evident that, whatever may have been the special purpose of the plaintiffs, the defendant had no knowledge or means of knowledge of it, and could not have contemplated either a loss of a sale, or a sale at an under value, or any other disposition of or dealing with the well or any other property, as the probable or possible result of a breach of its contract. The loss which would, naturally and necessarily, result from the failure to deliver the message, would be the money paid for its transmission, and no other damages can be claimed upon the evidence as resulting from the alleged breach of duty by the defendant. The plaintiffs have lost the money paid the Ogdensburgh company, and are entitled to recover it, but the sale of their property at a loss was not in the contemplation of the parties, and the damages resulting therefrom were not the natural and ordinary damages resulting from the breach of duty by the defendants.

Indeed, I doubt if under any construction of the contract, or in any view of the rights and obligations of the parties, such damages could be recovered by the plaintiffs, as the result of the non-delivery of the message. They are quite too remote, and depend upon too many contingencies. Had the message been received, the agent might or might not have answered it; and what the answer would have been cannot certainly be known. The answer might or might not have been received by the plaintiffs at Rochester, and if received,

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it is conjectural what might have been the action of the plaintiffs thereon. Again, the sale without an attempt to obtain further information was the voluntary act of the plaintiffs, neither caused nor encouraged by the act or default of the defendant. The mere assertion to the operator at Ogdensburgh, had he been the agent of the defendant, that they would sell if no answer was received to the message, did not relieve them of the duty resting upon all persons, for whose losses others may be liable to respond, to take all reasonable measures to avoid loss or to diminish the damages that may occur. This principle is applicable to all who may claim indemnity from others for losses, either upon express contract or for torts. (*Hamilton v. McPherson*, 28 N. Y., 72; *Milton v. Hudson River St. B. Co.*, 37 id., 210; *Wilson v. Newport Dock Co.*, 4 H. & C., 232.) The defendant offered evidence tending to prove that the plaintiffs might, before the sale of the property, have obtained the desired information which it is claimed would have prevented its consummation and avoided all loss, and it should have been received, as it would have constituted a perfect defence.

It cannot be claimed that there was any valid contract of the defendant by which the plaintiffs were insured against the consequence of their own acts or neglect.

The judgment must be reversed and a new trial granted, costs to abide event.

All the judges concur, except RAPALLO, J., not present, and FOLGER, J., not voting.

Judgment reversed.

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JOSHUA ATKINS et al., Appellants, v. JAMES W. ELWELL, et al., Respondents.

An objection to the admission of a copy, on the ground that it was "incompetent and immaterial," does not raise the question that the paper was improperly admitted, because a copy, and not the original.

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The protest of the master of a vessel, made in a port of distress, where the owners have presented to the insurers and used such protest on a claim for insurance, is admissible evidence in behalf of the defendants, in an action brought by such owners, employers of the master, for fraudulent representations as to her condition, alleged to have been made by the defendants upon her sale to the plaintiffs. What constitutes fraud in making a false representation upon a sale, discussed by FOLGER, J.

(Argued May 22d; decided June 6th, 1871.)

APPEAL from the judgment of the General Term of the Supreme Court, in the first judicial district, affirming a judgment rendered at the circuit, in favor of defendants.

This action was brought to recover damages alleged to have been sustained by the plaintiffs by the fraud of the defendants, on the sale of a ship to them. The complaint averred, that the plaintiffs were induced to make such purchase by the false and fraudulent representations of the defendants that the vessel was sound and in good order; whereas, at the time, the ship was unsound and badly worm-eaten, as the defendants then well knew. The answer fully denied these averments. On, and prior to the 14th of March, 1863, the ship was owned by the defendants. Elwell was the only owner whom the plaintiffs saw before the sale. On the 14th of March, one Kelly, who acted as broker between the parties, signed, on their behalf, a contract of sale of the ship. Afterwards, bills of sale thereof were executed. The ship was built in 1855; in March, 1862, she was repaired, opened, and surveyed, and certificates of her soundness given by the American and French Lloyds. In December, 1862, she was chartered to the government; on her return, at the expiration of the charter, she was taken possession of by plaintiffs, in March, 1863. She was sent by them to San Francisco, but encountering bad weather, put in to Rio Janeiro in distress, where a protest was made by the master before the consul. Thirty-three months after the purchase, the ship was tendered back, on the ground that at the time of the sale she was worm-eaten and unsound, and not as warranted. The defendant, Elwell, expressly denied making any representa-

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tions as to her soundness. One of the plaintiffs, on the stand, swore that the protest made by the master of the ship at Rio, and which had been used by the plaintiffs in obtaining insurance money from the insurers, had been lost; that the copy produced was a correct one. The defendants thereupon offered the copy in evidence, as showing statements of the master as to the soundness and condition of the ship. The evidence was excepted to by the plaintiffs, on the ground that it "was immaterial and incompetent." The other facts sufficiently appear in the opinion.

*B. F. Tracy*, for the appellants. A fraud may consist in representing a fact as within the knowledge of the party making the representation when no such fact exists. (Story on Contract, § 506; Story on Eq. Juris., §§ 192, 193; *Craig v. Ward*, 36 Barb., 377; *affd.*, 3 Keyes, 387; *Sharp v. The Mayor*, 40 Barb., 258; *Bennett v. Judson*, 21 N. Y., 238; *Griswold v. Haven*, 25 N. Y., 595; *Elwell v. Chamberlain*, 31 N. Y., 611; *Stone v. Denny*, 4 Metc., 151, 161; *Cabot v. Christie*, 42 Vt., 121; 1 Amer. Rep., 313; *Taylor v. Ashton*, 11 Mes. & W., 418; *Hammatt v. Emerson*, 27 Maine, 308, 326; *Hazard v. Irwin*, 18 Pick., 95; *Leather v. Simpson*, 24 Law Times, N. S., 288.) Concealed knowledge of a defect is fraud. (*Nickley v. Thomas*, 22 Barb., 654, citing 18 Johns., 403; 1 East, 318; 6 Cow., 346; 7 Wend., 20; *Beach v. Sheldon*, 14 Barb., 72; *Brown v. Montgomery*, 20 N. Y., 287; Code, § 169; *Craig v. Ward*, 36 Barb., 377; 3 Keyes, 387; *Bennett v. Judson*, 21 N. Y., 238; *Lounsberry v. Purdy*, 18 N. Y., 515; *Coleman v. Playstead*, 46 Barb., 29.) A concealment is a misrepresentation. (*Conyers v. Ennis*, 6 Cow., 116, note; S. C., 2 Mason, 236.) The defendants are responsible for the representations of the broker. (Parson's Merc. Law, 152, and cases cited; *Bennett v. Judson*, 21 N. Y., 238; *Elwell v. Chamberlain*, 31 N. Y., 619; *The Monte Allegre*, 9 Wheat., 644; *Andrews v. Kneeland*, 6 Cow., 359; *Nelson v. Corning*, 6 Hill, 336, 338; *Fern v. Huet*, 4 Tenn. R., 177; *Ferguson v. Hamilton*, 35 Barb., 427,

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441 ; Story on Agency, § 134 ; *N. R. Bk. v. Aymar*, 3 Hill, 262 ; *Sanford v. Hardy*, 23 Wend., 260 ; *Jeffrey v. Bigelow*, 13 Wend., 518 ; *Bk. of N. S. v. Davies*, 2 Hill, 451.)

*E. W. Stoughton*, for the respondents.

FOLGER, J. This appeal is based upon certain exceptions to the rulings of the court below upon the admission of evidence, to its refusal to charge the jury in some particulars as requested, and to portions of the charge as delivered.

The first exception is to the admission in evidence of the protest made by the master of the ship at Rio, and which was used by the plaintiffs in the establishment and collection of their claim against the insurance companies for the damage suffered by her. One of the plaintiffs, being upon the stand as a witness, testified, that though he had made search and inquiry for the original protest, he could not find it, and that the paper which he produced was a correct copy of it. The copy was then offered in evidence. The first objection made by the plaintiffs was "to the reading of the protest, as incompetent and immaterial." It is now sought to sustain this objection on the ground that the paper read was a copy and not the original. Such does not appear to have been the explicit objection at the circuit. We think that idea was not conveyed to the mind of the court; for, although in strictness the epithet of incompetent applied to a witness indicates some legal defect in him, rather than in the matter which he is called to utter, and so to a paper, it may indicate that of itself it was objectionable, in its form or mode of authentication, rather than for what it contained, yet the common and different use of the phrase has worn off the sharpness of this meaning. And to make the alleged defect in the paper itself available on review, the attention of the court and of the opponents should have been drawn with more exactness to the specific ground of objection now taken. Had this point, that this was but a copy, been plainly presented, it might have been, if indeed it was not, avoided, by preliminary proof



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of loss or destruction of the original. By the objection that the reading of the protest was incompetent, was doubtless understood, that though, as a general rule, the declarations of a party made out of court may be proven against him, still a "protest" was not such a declaration as came within that rule. But it was a proper mode of showing a declaration of the plaintiffs. It was a solemn instrument, made by their agent, for their benefit, in the course of his duty. It was used by them in a matter of importance to them and to others. It was used by them upon a question which was at issue in the action then upon trial, to wit, the condition of a vessel at a time at which they in this action allege that she was unsound. How much weight should be given to it, is not the point here. Whatever weight it had, the defendants were entitled to, as its statements, adopted by the plaintiffs and used by them for their benefit in one instance, could not be repudiated by them in another. So it spoke of matters material to the pending issue, and it furnished a proper mode of establishing those matters against the plaintiffs. (1 Phil. on Ev., 449, chap. 8, § 10, and cases there cited, especially *Brickell v. Hulse*, 7 Ad. & Ellis, 454.) And the case last named is a sufficient authority against the second objection of the plaintiffs to it, that the mate of the vessel who had also signed the protest was alive; for in *Brickell v. Hulse*, the person who had made the affidavit which was put in evidence was not only alive, but was present in court. The plaintiffs cite to us certain cases. (2 Hill, 538; 9 Mass., 216; 1 Moore and Robinson, 523, and Hardres's Rep., 472.) The distinction between them and the authorities relied on in Phillips on Evidence, is that in the last the party, against whom the affidavit or other document was sought to be used, had adopted its statements and made them his own, had used it for his advantage after he had seen it and known what it declared, while in the first they were statements of others not reasserted and adopted as true, or those of a witness called to the stand indeed by the party, but without his control or knowledge of what the witness would alter in testimony, or

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were depositions taken out of court, subject to the same uncertainty of what the witness would say, and not used by the party for his benefit after what had been said was known to him.

The evidence admitted from the witness Kelly, as to the sources of the statement made by him, was not irrelevant. It was not received to show that the statement was not false, but to show that, even if false, being obtained from sources which might well be deemed authentic, the broker might well have used it without fraudulent intent, and also to show that, being derived from other sources than the defendants themselves, though conceding it was false, no fraudulent intent in its use by the broker was necessarily to be imputed to them. In this view it was proper. The witness Proal was called by the defendants to testify as to an examination of the vessel made by him, and produced a memorandum book kept by him, and after saying that he had no memory and could not speak of the matter apart from the book, he was asked whether he had "any impression from recollection on that subject?" To this the plaintiffs objected without then stating any ground of objection. The ground now taken is, that having once said that he had no memory, it was error to call for and allow him to state an impression from recollection. To sustain this objection, would be to hold that a party was precluded by the first answer given by his witness, and that he could not, by bringing circumstances to his mind, refresh his recollection so that he could afterward make a variant statement. Diverse statements, made by a witness in the same examination, are matter of comment to a jury as to the reliability of a witness, but there is not error in allowing a question put by the party calling him, predicated upon a supposition that he may answer differently from what he has heretofore testified to the questions of the same party, on the same trial.

The plaintiffs requested the court to charge the jury "that if the defendants, or any of them, knew that this ship was wormed, and that fact was concealed from the plaintiffs, and

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it proves that she was wormed, the defendants committed a fraud for which they are liable.”

It is sufficient to say of this request, that a question of fraudulent concealment was not in the case. The complaint was upon affirmative false representations fraudulently made. The trial was upon that issue, and though evidence may have been given which would bear upon a question of concealment without representations, we think that the court could properly refuse to give the case to the jury upon the issue presented by the request to charge. Upon a request of the plaintiffs to charge, and upon exceptions to portions of the charge, a point is made that there was substantially taken from the consideration of the jury any representations made to the plaintiffs by the broker of the defendants. Giving to this point all the force and scope which can be asked for it, it does not appear that there was any error. The broker and the plaintiffs had met, and he had made his representations before the meeting of the plaintiffs and defendants. But if it be conceded that the broker made statements which were intentionally false and fraudulent, there is lacking another element to make them available to the plaintiffs, and a fitting subject for the consideration of the jury. It must be found, to sustain a verdict, that the plaintiffs, in making the purchase of the ship, relied upon them.

But that reliance they expressly negative in their testimony. One of the plaintiffs testifies that he told Elwell, one of the defendants, that they bought her entirely on his representations. We must assume that he said to the defendant what was the truth, and that they did rely entirely upon his representation. The other plaintiff testified, that they said to Elwell, “we are relying on your honor with regard to this ship, in a great measure; if you say she is right in every way, and thoroughly sound, we will take the ship at \$42,500; and we took her.” Thus from their own mouth, it appears that they did not rely upon the broker’s statements. It would have been nugatory, to have given to the jury the considera-

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tion of matter which lacked this very important essential of making out a case for the plaintiffs.

The plaintiffs requested the court to charge, "that if the jury believed that it was represented by these defendants, that the ship had been opened, examined, and found sound, in January, 1863, and the plaintiffs relied upon it, and were deceived by it, and that if they further believe that the representations were false, the defendants were liable." The court refused so to charge, further than it had already charged.

There was no error in the refusal. It will be observed that the request did not state a proposition which, if granted and adopted, would warrant the jury in finding for the plaintiffs. It called upon the court to leave it to the jury to find the making of the representations, that the plaintiffs relied upon and were deceived by them, and that they were false, and from these findings to find liability. But in these findings there would not be culpability established against the defendants. If the jury should not also find that the representations were fraudulent, that is, that the defendants knew when they made them that they were false, or that they assumed and expressly professed knowledge that they were true, there would still be lacking one fact in the series necessary to charge them. It is true, that the jury might, if they should have found the facts indicated in the request, have inferred from them, and so have found, guilty and fraudulent knowledge. But it was in the province of the jury so to find, while the request assumed it as an inference the court, as a matter of law, would make. The court had already charged the jury, that if representations of soundness were made, which the defendants *knew were false, or knew, or had been informed of facts or circumstances which would have led a man of common sense and prudence to believe or think that the ship was or might be wormed, etc.* The request should have embodied this element of knowledge of the falsity of the representations, or information of facts and circumstances which would put upon inquiry. (*Hammatt v. Emer-*

son, 27 Maine, 308; *Marsh v. Falker*, 40 N. Y., 562, and note.)

The plaintiffs requested the court to charge "that if the defendants or any of them, *or their agent*, made representations that the vessel was sound, *in such manner as to import knowledge* in him or them of the fact that she was sound, and made them with the intent that the plaintiff should rely on them, and the plaintiffs did rely on them, and they turn out to be false, the plaintiffs are entitled to recover." But for one phrase in this request it might have been sustained. That phrase is, "or their agent." We have already shown, that a verdict for the plaintiffs, based upon the representations of Kelly, the broker, would not have been well founded; for the reason that the plaintiffs did not rely upon them in making the purchase. But the court, if it had acceded to the request of the plaintiffs, would have instructed the jury that they might have found a verdict upon those representations, if they were made in a manner to import knowledge. The court was not bound to do this, nor was it compelled to separate the proper parts of the request from those not proper. Hence there was no error in the refusal to charge as requested in this proposition as a whole.

We have not been able to find that in the points suggested in the argument and brief of the appellant, there was any error on the trial, or in the charge to the jury, or in the refusals to charge.

The judgment of the court below must therefore be affirmed, with costs to the respondents.

Judgment affirmed.

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THE FARMERS' AND CITIZENS' NATIONAL BANK, Respondent, v.  
ALFRED NOXON AND ROSCIUS R. KENNEDY, impleaded with  
DANIEL K. COLBORN, Appellants.

Proof of a diversion of commercial paper from the purpose for which it was delivered by the maker, casts upon the holder the burden of showing that he is, or has succeeded to the rights of, a *bona fide* holder.

A note made by N. for \$5,000, indorsed by K., was delivered to C. to be discounted for the benefit of N. C. kept an account with the plaintiff's bank, in the name of "C, agent," and was known to the plaintiff to be in embarrassed circumstances; but was also known to be doing business as a broker, under the same name, and had been in the habit of procuring the plaintiff to discount notes, as large in amount as N.'s note, made and indorsed by others, and which were paid. He delivered N.'s note to the plaintiff, with other collaterals, as security for what he then owed, or might thereafter owe, and was permitted to overdraw his account some \$8,000. Afterwards the plaintiff discounted for C. his own note for \$18,000, taking N.'s note, with others, as security, and credited the proceeds on C.'s account. C. then drew out over \$9,000, which left a balance to his credit, after satisfying his over draft.

*Held*, in an action by the plaintiff upon N.'s note, that the circumstances under which it was received did not show that it was not taken in good faith; that the plaintiff became a *bona fide* holder of it as security for C.'s overdraft, and was a *bona fide* holder of the note, as security for the payment of C.'s own note.

(Submitted June 12th; decided June 22d, 1871.)

APPEAL from an order of the General Term of the Supreme Court in the second district, affirming (as modified) a judgment in favor of the plaintiff, entered upon the report of Nathan B. Morse, Esq., referee.

This action is upon a promissory note for \$5,000, dated October 22d, 1866, payable three months from date, made by the defendant Noxon, and indorsed by the defendants Kennedy and Colborn, the indorsement of the latter being "D. K. Colborn, Agent."

The following facts were found by the referee: Noxon and Colborn, for a number of years before the date of this note, had transactions together, mainly in borrowing money from banks and others, among them the plaintiff's bank. Colborn,

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Statement of case.

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for a considerable time before the date of the note and until the commencement of this action, kept an account in the plaintiff's bank, and had, before that date, procured the plaintiff to discount paper belonging to, and placed in his hands for that purpose by, Noxon, some of which was indorsed by Kennedy for Noxon's accommodation. October 22d, Noxon made four notes, payable to Kennedy and indorsed by him, for the purpose of meeting other notes of Noxon to come due; and in which four notes the time of payment was left blank, so that the longest time that could be obtained from the banks, in negotiating them, might be filled in. These notes were then delivered to one Smith, for the purpose of having him or Colborn, or both, negotiate them and apply the proceeds to the object above expressed. Among them was the note in suit.

Colborn filled in a time of payment, and deposited with the plaintiff the note in suit, with other commercial paper, as collateral security for such money as he owed, or as might become due from him to the plaintiff, and was permitted to and did, on the credit of those securities, overdraw his bank account more than \$8,000. On the 22d of November a loan of \$18,000 was made by the plaintiff to Colborn, on his own note, secured by certain paper enumerated on the face thereof, among which was the note in suit. A sufficient amount of this loan was applied to the discharge of Colborn's previous overdrafts, and the remainder was received by him.

Within two or three weeks after the 22d of October, Noxon had notice that some of the four notes made by him had been discounted at the plaintiff's bank, and the proceeds had not been used for the purpose for which they were delivered by him, and was then promised by Colborn that such of them as had not then been discounted should be returned to him, Noxon; but he gave no notice to the plaintiff of any of the facts. The plaintiff never had notice of the purpose for which the note in suit had been made or indorsed.

It appeared from the evidence that Colborn was, during all this time, in embarrassed circumstances, to the knowledge of

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the plaintiff; that he did business as a broker, and kept his account with the plaintiff in the name of "D. K. Colborn, Agent."

The referee found the amount due upon the \$18,000 note (all the collaterals thereto except the note in suit having been paid and applied thereon), to be \$4,946.42, for which sum the plaintiff had judgment.

The General Term corrected an error of the referee in stating the amount, reducing it \$521.25, and affirmed the judgment as corrected.

*George C. Blanke*, for the appellant, cited *Edwards on Bills*, 319; *Wardell v. Howell* (9 Wend., 170); *Prentiss v. Graves* (33 Barb., 621); *Brown v. Tuber* (5 Wend., 566); *Bank of Rochester v. Bowen* (7 Wend., 158); *Ang. & Ames on Corp.*, §§ 305-306; *President, etc., v. Corwin* (37 N. Y., 320); *Noonras v. Cordell* (43 Barb., 449); *Tyler v. Gardiner* (35 N. Y., 574); *Stalker v. McDonald* (6 Hill, 93); *McBride v. Tarbor's Bank* (26 N. Y., 450); *Cardwell v. Hicks* (37 Barb., 458).

*Amasa J. Parker*, for the respondent, cited *Story on Prom. Notes*, § 195; *Chitty on Bills*, 8th ed., p. 85; *Warren v. Lynch* (5 John., 239); *Bay v. Coddington* (5 John. Ch., 54); *Bank of Salina v. Babcock* (21 Wend., 499); *Bank of Sandusky v. Scoville* (24 id., 115); *Williams v. Smith* (2 Hill, 301); *Seneca County Bank v. Ness* (5 Den., 330); *Hunt v. Fish* (4 Barb., 324); *Montross v. Clark* (2 Sandf., 115); *White v. Springfield Bank* (3 id., 222); *Young v. Lee* (18 Barb., 192); affirmed, 2 Kern., 551; *Stettheimer v. Meyer* (33 Barb., 215); *Brown v. Burrell* (31 N. Y., 113); *Magee v. Badger* (34 N. Y., 248); *Pratt v. Cowan* (37 N. Y., 44); *Swift v. Tyson* (16 Peters, 15); *Mohawk Bank v. Coney* (1 Hill, 509); *Burns v. Rowland* (40 Barb., 374); *Smith v. Murdock* (1 Abb. N. S., 374); *Bromley v. Walker* (51 Barb., 207); *Davis v. McCreedy* (17 N. Y., 230); *Steinhart v. Boker* (34 Barb., 443); *Marine Bank v. Clements* (31 N. Y., 33); *Tilton v. Nelson* (27 Barb., 601); *Belmont v. Hage* (35 N. Y., 65).



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Opinion of the Court, per GROVER, J.

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GROVER, J. The defendants proved that the note in suit had been diverted from the purpose for which it had been delivered to Smith by the maker as his agent. This cast upon the plaintiff the onus of showing that it was a *bona fide* holder, or had succeeded to the rights of such a holder. (Edwards on Bills, 319; *Wendell v. Howell*, 9 Wend., 170.) The facts found by the referee show that the plaintiff was such holder. The counsel for the appellant insists that the plaintiff's president received the note under circumstances of suspicion sufficient to put him upon inquiry, and that such inquiry would have led to a discovery of the diversion. There is no exception in the case raising this question, but if there was it would not be available to the defendant. The only circumstances relied upon in support of the position are that Colborn, from whom the plaintiff received the note, kept his accounts with it as agent, and that the president of the plaintiff knew that he was embarrassed in his circumstances. But it was also proved that he was doing business as a broker in New York, and was in the habit of procuring notes made and indorsed by others to be discounted by the plaintiff, of an amount as large as the one in question, which had been paid. Under these facts there was nothing to excite suspicion as to his ownership of the note, much less to induce a belief that the plaintiff did not take it in good faith. (See *Magee v. Badger*, 34 N. Y., 247.) The exceptions to the findings of fact by the referee raise in this court the question only, whether there was any evidence in support of the finding. In the Supreme Court the question upon such an exception is, whether the finding is against the weight of evidence, but the latter question cannot be considered here. The finding by the referee that the note was delivered to the plaintiff by Colborn, with other collaterals, as security for what Colborn owed the plaintiff, or might become indebted to it, was sustained by the testimony of Colborn, and the account of the plaintiff with him shows that, after such delivery, Colborn was permitted to overdraw his account to an extent that, on the 22d of November, the account was overdrawn

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upward of \$8,000. The plaintiff was a *bona fide* holder of the note, as security for this amount. It is further found, that upon the 22d of November, 1866, the plaintiff 'discounted for Colborn his note for \$18,000, and received from him this note, together with other notes, as security for the payment of the note, and credited the proceeds in Colborn's account; that he then drew upward of \$9,000 from the plaintiff, leaving a balance to his credit after satisfying the amount due the plaintiff upon the overdraft. The plaintiff was a *bona fide* holder of the note, as security for the payment of the \$18,000 note, and had the right as such to enforce payment, so far as necessary to satisfy such note. It is clear that this right is not affected by the application of a portion of the proceeds to the payment of the debt due the plaintiff from Colborn. The General Term corrected the error of the referee in stating the account of the amount received by the plaintiff from the collaterals other than the note in suit, so as to give the defendant the benefit of all such payments. None of the exceptions to the rulings of the referee as to the competency of evidence were well taken, except such as were obviated by the subsequent withdrawal by the plaintiff of the objections made, and giving the defendant an opportunity to introduce the testimony. The judgment appealed from must be affirmed.

All concur.

Judgment affirmed.

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d148 675.

WILLIAM S. ROLLIN, Respondent, v. SARAH J. CROSS,  
Appellant.

Under the statute authorizing "mechanics' liens" in the counties of Kings and Queens (Laws 1862, chap. 478, p. 947), a lien cannot be acquired for work done or material furnished under a contract with an equitable owner, as against one holding the legal title, unless the building is constructed by permission of the latter.

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But, if the equitable owner permits the building to be erected, and, before lien filed, by the performance of a contract of purchase becomes the legal owner, the conveyance will be held to relate to the time when the contract of purchase was made, and such owner to be within the statute. The lien given by the statute is, in general, a personal right given to the mechanic, material man and laborer, for his own personal protection, and an assignee of his claim is not authorized to file a lien, unless such assignment is for the benefit of the assignor, to be held as by his agent, so that the lien may be preserved.

(Submitted June 9th; decided June 23d, 1871.)

APPEAL from an order of the General Term of the Supreme Court, second district, affirming a judgment in favor of the plaintiff, entered upon the report of William J. Cogswell, referee.

The action is brought to foreclose a mechanic's lien on premises in Brooklyn.

November 10th, 1867, Thomas S. Goodwin made a contract with Edward Pick to build a house on the premises for him. At that time Charles C. Betts was the legal owner of the land. Pick did work and furnished materials to the amount of \$800, and then assigned the contract and the moneys due him thereunder to the plaintiff. The assignment was made January 8th, 1868. After the assignment, Rollin went on and did work and furnished materials to the amount of \$400, between the date of assignment and the date of filing lien. On the 13th of January, 1868, Betts conveyed the property to the defendant by deed dated September 14th, 1867, but not acknowledged or delivered until January 13th, 1868.

The plaintiff filed his lien for the amount of all the work done and materials furnished, both by Pick, the original contractor, before assignment, and by himself, as assignee of the contract, after assignment of the contract to him. On the 16th of April, the defendant conveyed the property to William H. Rushmore, who now holds the fee.

The whole amount of the work done by the plaintiff and materials furnished by him, after the contract was assigned to him, was \$400. The lien is filed against Sarah Cross, the

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Opinion of the Court, per ANDREWS, J.

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defendant, who owned the fee from January 13th, 1868, to April 16th, 1868, and not against Betts, who owned the fee when the contract was made.

The judgment is given for the plaintiff for the whole amount of his claim, \$1,200, and interest and costs, including the work and materials done and furnished by Pick, the original contractor, before he assigned the contract to the plaintiff. Goodwin and Pick acted on the assumption that the defendant owned or had an interest in the premises.

The work was done with the knowledge and consent of the defendant, although she did not authorize Goodwin to make any contract for her, and did not intend to become personally responsible.

*Crooke, Bergen and Clement*, for the appellant.

*J. L. Overfield*, for the respondent.

ANDREWS, J. It is found by the referee, that the land upon which the lien is claimed was not conveyed to the defendant until January 13th, 1858.

But it is a just inference from the findings, in connection with the evidence, that when the contract was made between Goodwin and Pick, on the 10th of November, 1867, she held the land under a contract of purchase from Betts. His deed to her, although it was not acknowledged until the 13th of January, 1868, was dated the September previous.

The witness, Goodwin, testifies that Mrs. Cross purchased the lot, and that a house was to be built upon it for him and his family, and that she was to advance money to assist him in building it. The parties acted upon the assumption that Mrs. Cross had an interest in the premises. The contract was made, and the work on the house was commenced without any consultation, so far as it appears, with Betts, and he subsequently delivered the deed to Goodwin for her.

There is no proof when the purchase-money was paid, or whether anything had been paid at the time the contract for

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building the house was made. The legal title to the land at that time was in Betts, subject to such rights as Mrs. Cross had under her contract of purchase.

The statute under which the lien is claimed (Laws 1862, chap. 478), gives to a contractor for building a house a lien upon the land upon which it is built, under certain conditions, and upon the existence of certain facts, which are specified in the act.

The work must be performed under a contract with the owner of the land, or his agent, or with a person permitted by the owner to build upon it. (§ 1.) The lien given by the statute is one unknown to the common-law, and the party claiming under it a lien upon the premises of another, must bring himself within its terms.

In the absence of any definition in the statute, it might well be that a person having an equitable title to the land upon which the work was done and a right to a conveyance of the property would be regarded as the owner of the land, within the statute, and that the lien, under a contract made with a party having such a relation to it, would attach to the equitable interest, as upon a contract made with the owner.

The vendee in such a contract is treated in equity as the owner, and many of the incidents to a legal title attach to the interest of a vendee under a contract of sale.

But the first section of the act referred to, after defining the persons in whose favor the lien may be created, and declaring that the lien shall extend to the value of labor and materials performed or furnished "by virtue of any contract with the owner of the lands or his agent, or with any person permitted by the owner of the lands to build, etc.," thereon, concludes as follows: "In cases in which the owner has made an agreement to sell and convey the premises to the contractor or other person, such owner shall be deemed to be the owner, within the meaning and intent of this act, until a deed shall have been actually delivered so as to pass the fee simple of said premises."

It is the clear construction of this statute, that a lien upon the land cannot be acquired for work done or materials furnished under a contract made with the equitable owner, as against the person holding the legal title, unless the building is constructed by his permission. When the work is done by his consent, the lien attaches to the land and is a charge upon his interest therein. If no consent has been given, the contract is not within the statute.

It was the design of the statute to charge the land with debts contracted in improving it, in case the owner permitted the work to be done, although under a contract made with the vendee.

If the contract of sale should be surrendered or forfeited, the value of the owner's interest would be increased by the accessions made to the land, and if the purchaser completed the purchase, he would take it charged with the lien in favor of those who had contributed their labor and property in improving it.

It was held in *Loonie et al. v. Hogan* (9 N. Y., 435) that the owner of a lot who had contracted to sell it, and to make a loan to the purchaser to build upon it, was not the owner of the building erected by the purchaser within the lien law of 1830 (Laws 1830, p. 412), although, by the agreement of sale, the title was not to be transferred to the vendee until the completion of the building.

The statute in question protects laborers and material men against such a construction.

The permission of the vendee to build upon the land is, by such an agreement, a part of it, and under a contract made with the vendee, the lien given by statute could be secured.

In this case, Mrs. Cross, who had the equitable title to the premises when the contract was made, permitted Goodwin, who made the contract with Pick, to build upon them.

Before the time arrived for filing the lien, her equitable title became a legal one by the conveyance to her, and that title remained in her when the lien was filed.

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Opinion of the Court, per ANDREWS, J.

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The legal title was acquired, under her contract with Betts, which existed when the building contract was made.

The inchoate right under the contract of purchase was perfected and became a legal title by the conveyance.

It is consistent with legal analogies to hold that the conveyance related to the time when the contract of purchase was made, and that the defendant was, within the statute, the owner of the land, when Goodwin and Pick, by her permission, entered into the contract for building the house, and this construction supports the equities of this case.

In this view the conditions of the statute are met, and a lien under it was given, and was properly filed against the defendant.

The lien was filed by the plaintiff as assignee of the contract with Pick.

At the time of the assignment, a portion of the work had been performed by the original contractor, and it was completed by the assignee.

The notice of lien was filed for the value of the whole work, and by the judgment the lien was allowed to be enforced, as well for the work done before as after the assignment.

The assignee was not, we think, entitled to a lien for the work done before the assignment.

The lien under statutes of this character is, in general, a personal right given to the mechanic, material man and laborer, for his own protection, and the right to create it cannot be assigned or transferred to another, (*Daubigny v. Duval*, 5 Tenn., 604; *Caldwell v. Laminer*, 10 Wis., 332; *Pearsons v. Tincker*, 36 Me., 384), unless the assignment is made for the benefit of the assignor, and to be held as his agent, so that the lien may be preserved. (*Urquehart v. McIver*, 4 Jo., 102; *McCombie v. Davies*, 7 East, 5.)

The statute, under which the plaintiff claims, does not authorize a lien to be filed by the assignee of a debt for work performed under a building contract.

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The words "or other claimant" in the third section do not, we think, enlarge the specification, in the first section, of the persons in whose favor a lien may be created.

The judgment should be reversed, unless the plaintiff elects to reduce the judgment to \$400, with interest from March 11, 1868, in which case the judgment is affirmed without costs.

CHURCH, C. J., ALLEN, FOLGER and RAPALLO, JJ., concur. GROVER, J., dissents. PECKHAM, J., not voting.

Judgment reversed, unless reduced to \$400 and interest from March 11, 1868; in which case judgment affirmed.

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THE PEOPLE OF THE STATE OF NEW YORK, ex rel. JOHN HAINES and ISAAC ROY, Respondents, v. WILLIAM H. SMITH, county judge of Ontario county, Appellant.

Proceedings having been had to authorize the issue of bonds of a municipal corporation to aid in the construction of a railroad, under the act of 1869, requiring the county judge to determine certain facts and render judgment thereon (Laws of 1869, chap. 907, p. 2808), a writ of certiorari may properly issue to such county judge, for the purpose of a review of his proceedings by the Supreme Court, notwithstanding his determination has been entered of record.

Upon the return to such writ the court is not limited to the inquiry whether jurisdiction of the parties and subject-matter was acquired, but should examine the evidence and determine whether there was any competent proof of the facts necessary to authorize the adjudication made, and whether, in making it, any rule of law affecting the rights of the parties has been violated.

In such proceedings, competent common-law evidence of the facts to be established should be produced before the county judge, and, as his determination is binding upon those who do not appear before him, no admission, or other act done or omitted, by those who contest the application, can be regarded as evidence, or affect the rights of those not appearing.

It is not sufficient that the signatures to the petition be proved, unless such petitioners are in some way identified as the persons named on the "last preceding tax list or assessment roll." If the names upon both are identical, this is *prima facie* evidence that the persons are the same; but the county judge may not act upon his personal knowledge, and, where initials only are given, additional evidence of identity is requisite.



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The authority conferred by the act must be exercised in strict conformity to and by a rigid compliance with the letter and spirit of the statute.

The petition required is that of the tax-payers, and the act is not satisfied by the petition of an agent. The power conferred is personal, and cannot be delegated ; and it is error to include as petitioners those whose names are affixed to the petition, in their absence, under a verbal authority given at some previous time.

(Argued June 15th ; decided June 22d, 1871.)

APPEAL from an order of the General Term of the Supreme Court, in the fourth judicial department, reversing, upon certiorari, a judgment of the county judge of Ontario county, in a proceeding on an application to bond the town of Phelps, Ontario county, to aid in the construction of the Sodus Point and Southern railroad.

By the return it appeared that a petition was presented to the county judge of Ontario county, purporting to be signed by a majority of the tax-payers of the town of Phelps, whose names appear upon the last preceding tax list or assessment roll as owning or representing a majority of the taxable property in the town, praying for the issue of its bonds to the amount of \$125,000 in aid of the Sodus Point and Southern railroad, pursuant to chapter 907 of the act of 1869, verified by the oath of one of the petitioners.

The county judge thereupon made an order for publication of notice of hearing, and, pursuant to such notice, a hearing was had before him and proofs taken, counsel appearing for the petitioners and also for those opposed to the application. He determined and adjudged that the petition was signed by a sufficient number of tax-payers ; appointed commissioners, and ordered that his judgment and determination be entered of record in the clerk's office of his county.

The relators sued out a writ of certiorari, upon the return to which the judgment of the county judge was reversed.

It appeared that many names in the petition were written with the initial letters of the Christian names, which the judge counted and allowed, without further evidence of identity than was furnished by comparison thereof with those

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appearing on the assessment roll; and in several instances similar names were counted as representing the same persons, as "Wormer" and "Van Wormer," "Owen" and "Owens," "Sarah" and "Sally," "Frank" and "Franklin," without other evidence.

The county judge received proof that names affixed to the petition were written by others, under verbal authority previously given, and not in the presence of the persons whose names were so written, and counted and allowed such names in making his determination.

The case in the Supreme Court is reported in 3 Lansing, p. 291.

*George F. Danforth* and *Stephen K. Williams*, for the appellant, insisted, among other things, that certiorari to the county judge, after judgment entered, would not lie. (*People v. Jewett*, 2 Wend., 314; *People v. Supervisors*, 1 Hill, 195; *People v. High'y Com'rs*, 30 N. Y., 72.) That identity of names was sufficiently shown. (*Jackson v. Goes*, 13 John., 518; *Jackson v. King*, 5 Cow., 237; *Jackson v. Cody*, 9 id., 140; *Fenton v. Perkins*, 3 Mis., 144; *Birch v. Rogers*, id., 227; *Greenshield v. Crawford*, 9 Mees. & W., 314; *Quarles v. Collier*, 3 Strobh., S. Car., 223; *Jones Estate*, 27 Penn. St., 336; *Woodbury v. Dye*, 10 Rich. L. R., S. C., 31; *Toole v. Peterson*, 9 Ind., 180; *Isuacs v. Wiley*, 12 Vt., 674; *Milk v. Christie*, 1 Hill, 102; *Smith v. Ross*, 7 Miss., 463; *Orme v. Shepherd*, id., 606; *Thompson v. Lee*, 12 Ill., 242; Co. Litl., 3; 1 Ld. Raym., 562; Vin. tit. misnomer, C., 6, pp. 5, 6; *Franklin v. Talmage*, 5 John., 84; *Rosevelt v. Gardner*, 2 Cow., 463; *Edmunson v. State*, 17 Ala., 179; *People v. Cook*, 14 Barb., 259; *McKay v. Speak*, 8 Texas, 376; *Hendershott v. Thompson*, 1 Morris, Iowa, 186; *State v. Martin*, 10 Mis., 391; *Kaig v. Hutchins*, 8 Foster, N. H., 561; *People v. Freeman*, 6 Cal., 205; *Van Vorhies v. Budd*, 39 Barb., 479; *Allen v. Taylor*, 26 Vt., 599; *Gershaw v. Walker*, 10 Ala., 370; *Fletcher v. Conly*, 2 Greene, Iowa, 88; *State v. Blakenship*, 21 Mis., 504; *Morton v. McClure*,

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22 Ill., 433; *Moore v. Anderson*, 8 Ind., 18; *Alvord v. Moffatt*, 10 Ind., 366; *Barnes v. People*, 18 Ill., 52; *Kalm v. Hernan*, 3 Kelley, Geo., 266; *Myer v. Fegaly*, 39 Penn. St., 429; *State v. Haverly*, 21 Mis., 498; *Mercedith v. Huesdale*, 2 Caines, 362; *Jackson v. Boneham*, 15 John., 226; *Petrie v. Woodworth*, 3 Caines, 262; *People v. Peuse*, 27 N. Y., 45; *Regina v. Mayor of Hartford*, 21 L. J. N. S., Q. B., 71; *Regina v. Avery*, 18 Q. B., 83 E. C. L., 576.) That the decision of the county judge on this question is conclusive. (*People v. Assessors*, 39 N. Y., 81; *People v. Bd. of Police*, id., 586.)

*H. L. Comstock*, for the respondents, that there was not sufficient proof of identity, cited *People v. Ferguson* (8 Cow., 102); *Jones' Est.* (27 Penn. St., 336); *Zellers v. State* (7 Ind., 659); *Rockwell v. State* (12 Ohio N. S., 427); *City Counsel v. King* (4 McCord., 487); *Quarles v. Collier* (3 Strobb., 223); *Birch v. Rogers* (3 Mis., 227); *Garrison v. People* (21 Ill., 535). That the court may go beyond the question of jurisdiction, and examine the case upon the whole evidence, he cited *People v. Bd. of Police* (39 N. Y., 506); *People v. Hillhouse* (1 Lans., 87); *People v. Assessors of Albany* (40 N. Y., 154).

GROVER, J. The counsel for the appellant insists that, the county judge having made his decision, and a judgment in pursuance thereof having been rendered and the record filed with the county clerk, before the writ of certiorari was sued out, the proceeding was not, at the time of the service of the writ, pending before him, and that the judgment was not, therefore, removed into the Supreme Court by the writ directed to him. In support of this position, the counsel cites the case entitled *The People v. The Comm'rs of Highways of East Hampton* (30 N. Y., 72). That case has no analogy to the present. That was a certiorari to a jury impaneled to determine whether the fence of the relator encroached upon the highway, and if so, to what extent. The

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jury, having made their certificate specifying the encroachment, had nothing further to do in the premises; and the court rightly held, that a certiorari could not be sued out directed to them, and, that if it was, and served upon them, the order of the commissioners of highways declaring and specifying the encroachment, not being in their possession, or control, could not be returned, and that if it was in some way returned, such return was a nullity. The case shows, that in some way, but it does not appear for what purpose, the commissioners of highways appeared in the matter in the Supreme Court. The court held, that such appearance was unauthorized, the writ not being directed to them, and that the writ should have been quashed. In the present case, the statute authorized and required the county judge, upon the presentation of the petition after publication of the requisite notice, to proceed judicially to take proof concerning and to determine certain facts and render judgment thereon, which was to have the like force as other judgments, as evidence of the facts determined. The statute is silent as to when or with whom the record of the judgment should be filed. The judgment was rendered by the county judge, and he was the proper officer to whom to direct the writ, and he was properly required thereby to make return of the proceedings had before, and the judgment rendered by him to the justices of the Supreme Court, pursuant to the mandate of the writ. The result would have been the same had the statute required the record of the judgment to be filed with the county clerk, or with any other officer. Such officer, for the purposes of a review, would have been regarded as the clerk of the judge, for the purpose of preserving the record of a judgment rendered by him. The proceedings were, therefore, properly before the Supreme Court for the purpose of a review. Whatever may have been the conflict of authority heretofore upon the question, whether, upon a common-law certiorari, the court can inquire into anything beyond the jurisdiction of the tribunal over the parties and subject-matter, it must now be regarded as settled, in this State, that it is the duty of the

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court, in addition thereto, to examine the evidence and determine whether there was any competent proof of the facts necessary to authorize the adjudication made, and whether, in making it, any rule of law affecting the rights of the parties has been violated. (*The People v. The Board of Metropolitan Police*, 39 N. Y., 506; *The People v. The Assessors of the City of Albany*, 40 N. Y., 154.) Section 2, vol. 2 of Laws of 1869, p. 2304, makes it the duty of the county judge, after the presentation of the petition specified in section one of the act and the publication of the notice thereby required, to take proof, as to whether the petitioners and such other tax-payers of the town as may then and there appear before him and express a desire to join as petitioners in said petition, are a majority in number of the tax-payers of the town, as shown by the last preceding assessment-roll, and represent a majority of the taxable property upon said roll. The assessment-roll is made the only competent evidence of the number of tax-payers and of the amount of taxable property in the town. It is conclusive upon these points. The only questions upon which proof is to be taken by the county judge, and which are to be determined by him, are whether the petitioners and such others as appear before the judge and express a desire to join in the petition constitute a majority in number of the tax-payers, and whether they are liable to taxation as owners of a majority of the property assessed for that purpose in the town. The correct determination of these questions is of grave importance, as upon it may depend the creation of a debt against the town to the extent of one-fifth of all the property taxable therein. The policy of the statute is to make such determination final. Competent common-law evidence of the facts to be established should be produced. The statute authorizes no other. It must be borne in mind, that the determination is final, not only as to taxable inhabitants who appear and contest the fact, but equally so as to those who do not appear. It follows that the admission of those who appear, or of any one authorized by them to act as counsel, or any other act done or omitted by them, cannot

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be regarded as any evidence upon the inquiry, as those appearing do not represent those who do not appear and cannot do anything to affect their rights. The signatures to the petition by the petitioners, found as such by the judge, were proved, but the persons proving the genuineness of such signatures give no testimony tending to identify such petitioners with persons assessed upon the roll, except Hiram Peck. The counsel for the appellant insists that his testimony may be construed in the light of the objections made to its competency, insisting that such objections show how it was understood by the counsel of the contestants, who appeared before the judge. The answer to this is, that it is immaterial how the counsel understood it. The inquiry is, what does the language used by the witness show that he intended to be understood as testifying to? The question was, state whether the names of the persons appearing on the petitions appear as tax-payers on the tax list of the town of Phelps for the year 1869. The answer was, yes, with certain exceptions. There are several names on the petition where no amount is carried out, and they are not counted in the number of names or amounts. I have carried out the amount assessed to each individual. The figures set opposite the names of petitioners are the amount they are assessed on the assessment roll. No one could have understood the witness as testifying to any personal knowledge of the identity of the petitioners with the persons named upon the roll. His clear meaning was that he had compared the roll with the petition, and from such comparison had formed the conclusion that the names designated the same persons upon both, so far as they appeared upon both. Both were before the judge, and copies of each, so far as this question is concerned, are contained in the case. Upon comparison it appears that the surnames are the same in both, to an extent sufficient to sustain the judgment as to the number and amount of property of the petitioners, but upon the petition an initial letter only is put down as the Christian name, while upon the roll the name at length appears, to an extent sufficient to show that the petitioners were a minority

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in number of the tax-payers, and were not assessed for half the amount of property upon the roll, unless the latter are included as petitioners. Where the names upon both were identical, it was *prima facie* evidence that the persons upon each were the same. (*Hatcher v. Racheleau*, 18 N. Y., 86.) But where the names are not identical, both upon reason and anorthity, no such presumption arises. In case of identity of name, the presumption arises from the improbability that different persons have the same name, and therefore the onus is cast upon the party denying the identity to show that it is a different person. But an initial letter may denote any one of a great number of names, and, unaided by proof of any other fact, designate the person with but little more certainty than as though the name abbreviated by the initial was wholly omitted. It was accordingly held in *The People v. Ferguson* (8 Cow., 102) that it might well be doubted whether H. F. Yates represented Henry Fry Yates or some other Yates whose Christian name was represented by the same letters, but that it might by proof of other facts be shown that Henry Fry Yates was the person really intended. It requires no argument to show that a given fact cannot be proved by proof of another fact, showing that the one sought to be proved is doubtful; such proof furnishes no evidence of the fact sought to be proved. The rule adopted in *The People v. Yates* has since been followed in this State. It was not designed by the remarks of SELDEN, Judge, in *The People v. Pease* (27 N. Y., 45), to the effect that the canvassers erred in refusing to allow to the relator (Moses M. Smith) votes for M. M. Smith, to innovate upon this rule. The learned judge directly thereafter cites *The People v. Ferguson*, without any expression of disapprobation. What he intended was, that from the facts proved upon the trial, it appeared that Moses M. Smith was the person for whom the votes were intended, and hence the error. But the facts proved upon the trial may have been known to the canvassers, and if they had the right to take such facts into consideration, in canvassing the votes, it would not aid the appellant. It is clear from the statute that the judge could

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not act upon his personal knowledge of any fact, but must be governed by the proof given in making his determination. The counsel for the appellant insists that the petition and affidavits, verifying the same, were made evidence of the facts, for the reason that they were given in evidence by the counsel of those appearing to contest such facts. But we have already seen that the counsel could not, by any act, affect the rights of those not appearing, and their rights are to be considered by the court, equally with those appearing, in determining the case. The Supreme Court was right in reversing the judgment of the county judge. I was inclined to remand the case to the county judge to proceed thereon *de novo*, pursuant to sec. 4, chap. 725, Laws of 1871, but a perusal of the case shows that, upon the hearing, the contestants offered to produce petitioners who desired to withdraw their names from the petition. To what extent petitioners desired to withdraw does not appear, but it may have been to an extent sufficient to change the result, even had it been proved that the names represented by initials were identical with those of tax-payers, when the name appeared in full upon the roll. Without determining whether those signing had a right to withdraw as petitioners, after it has been presented to the judge, yet their desire so to do may well be considered by the court in determining whether to remand the case to the county judge for further proof, no vested right having attached in consequence of the proceedings already taken. The town ought not to be bonded, unless in compliance with the present wishes of a majority of the tax-payers, taxable upon a majority of the property assessed in the town.

ALLEN, J. The order and judgment of the county judge of Ontario county, appointing commissioners, under chapter 907 of the Laws of 1869, with authority to issue the bonds of the town of Phelps in aid of the Sodus Point and Southern Railroad Company, were properly reversed, for the reasons assigned by the Supreme Court. Other objections were taken, at the hearing before the county judge and upon the



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argument in this court, relating to the vitality of the law, and the validity and efficacy of any proceedings under it, which, in the view we take of the proceedings, need not be considered. One objection taken before the county judge, not noticed by the Supreme Court, is too important to be passed over in silence, as it may affect very many applications under the act, and if well taken, the irregularity referred to ought not to be encouraged by any implication that might arise from mere silence in respect to it. The power sought to be delegated to a portion of the taxable inhabitants of a municipality to burden and charge the property of all, and subject it to taxation for a purpose foreign to those for which local governments are organized, and with a view to contingent benefits, in respect to which men may differ in opinion, and in aid of works, which in most instances, will more largely benefit some than other portions of the district, alike and equally charged, is one of grave importance, seriously affecting the rights and pecuniary interests of the citizen, and can only be exercised in strict conformity to and by a rigid compliance with the letter and spirit of the act conferring the authority. Nothing can be taken by implication, and the act, as it imposes a burden upon the public, and in a manner deprives the owner of the full control and disposition of his property, by giving to others the power to encumber it, should be strictly construed in favor of the rights of property. I had occasion, quite early in the history of town and city bonding in aid of private corporations, to express my views of the legislation authorizing it; and while the judgment in *Clark v. City of Rochester* (13 How., 204), as to legislative power, has not received the sanction of the courts, the effect of such a delegation of power to any portion of the electors or tax-payers of a municipality, and the consequences that may follow, are such as call upon courts to scrutinize very closely every attempted exercise of this power, and before giving it a judicial sanction, to see that every requirement of the law has been fulfilled. It may be that many of the works to which municipal aid is given, under the very liberal legis-

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lation of the few past years, and perhaps all, may be remunerative in the shape of dividends to the local governments aiding them, or may indirectly compensate the public for the tax that may follow by the increased value of the property in the locality; but this does not affect the principle. It is still the right of every one, until legally deprived of that right, to determine for himself to what extent his property shall be jeopardized or encumbered for such a purpose, or whether the contingent and consequential benefits of any proposed enterprise will justify a contribution or an encumbrance of his property in its aid. While it is for the legislature to decide upon the wisdom and expediency of the enactment of a law, and the province of the court is simply to interpret the act and give it effect according to the intent of the legislature, a statute in derogation of common right will not be extended by implication, but its operation and effect will be confined to the cases within the express language employed, giving it its ordinary signification, in the absence of any evidence that the legislature intended to use it in a different sense. This is the rule of interpretation of the act, as one giving power to the tax-payers. If the act be regarded as conferring special and extraordinary power upon a judicial officer, giving his orders, by which a public debt is authorized to be created, under laws mandatory upon the local governments to raise the money by tax to pay the same and the interest thereon, as occasion may require, the effect of judgments of courts of record, and making them final, unless reviewed within a limited time and by the prescribed process, it must in that view also be looked upon with jealous eye, and receive the strict construction which is given to all laws of that character. Nothing will be intended in support of his acts, but they must be brought clearly within the statute to be sustained. (*Davison v. Gill*, 1 East, 64; *Bigelow v. Stearns*, 19 J. R., 39; *Hollenbeck v. Fleming*, 6 Hill, 303; *Schneider v. McFarland*, 2 Comst., 459; *People v. Reed*, 5 Den., 554.)

The act under which these proceedings were had, authorizes a majority of the tax-payers of any municipal cor-

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poration, whose names appear upon the last preceding tax list or assessment roll, as owning a majority of the taxable property in the corporate limits, to make application to the county judge, by petition, verified by the affidavit of one of the petitioners, etc., etc. A petition of the tax-payers desiring the creation and issue of the municipal bonds, in aid of the railroad named, is essential to the jurisdiction of the county judge. Without such petition he is without jurisdiction, and his acts and proceedings are nullities. The petition demanded by the act is that of the tax-payer, and the act is not satisfied by the petition of an agent. Perhaps, upon a proper warrant, the name might be signed by another, but it must be the act of the applicant. Under the act permitting judgment creditors to acquire the title of the purchaser of lands sold under a prior execution, the affidavit required to be made by the assignee of a judgment, claiming to redeem, must be by the assignee, and cannot be made by his agent. (*People v. Fleming*, 2 Comst., 484; and see *Ex parte Bank of Monroe*, 7 Hill, 177.) The power conferred is personal to the tax-payer, and cannot be delegated by him.

Like the elective franchise, it must be exercised in person, and is not the subject of an agency. If another hand may write the name of the petitioning tax-payer, it must be under a special power for that purpose, so that the act will be the act of the tax-payer and in the exercise of his discretion. The act is of a personal nature, involving a personal trust or confidence, and is incapable of being delegated. A man cannot do homage or fealty by attorney, nor can one having but a bare authority or power, act by attorney. (Com. Dig. Attorney, C., 3.) And when an act is required by statute to be done by the party, if it can be fairly inferred, from the nature of the act, that it was intended to be personally done, it cannot be done by attorney. A person whose consent is requisite to the due execution of a power, cannot authorize another as his attorney to consent to any execution of it. (*Hawkins v. Kemp*, 3 East, 410; and see *Attorney-General v. Scott*, 1 Ves. Sr., 407.) The mode of application is pointed

out by the statute, to wit : the petition of the tax-payer ; and the statute must be followed, and the petition cannot be by an agent. (Sug. on Powers, 223.) A statute authority must in all cases be strictly pursued, and hence a sale by one of two commissioners of loans is void. Both must be present at the sale, and the subsequent execution of a deed by the two will not support the sale. (*Powell v. Tuttle*, 3 Coms., 396 ; *Olmsted v. Elder*, 1 Seld., 144.) Proof was given, under objection, upon the hearing before the county judge, of the signing of several names to the petition in the absence of the individuals, and under a verbal authority given at some previous time. Evidence was given of other signatures made in the presence of the individuals whose names were thus signed. It is not necessary in this case to pass upon the validity of the latter class of signatures ; but the practice of receiving proof of the other class cannot be too early or too earnestly condemned.

It requires but little knowledge of human nature and the workings of the human mind to see the great danger resulting from so loose a practice in a matter affecting important interests, public and private, and involving the exercise of deliberate judgment and discretion. A little hesitancy ; a diffident dissent ; a little want of firmness on the part of the tax-payers ; anything short of a very decided and emphatic negative may very well be taken as a consent to the signing of the petition, by an earnest, anxious or interested canvasser for signatures ; and when the tax-payer would not have consented to sign for himself, the agent of the enterprise may have drawn from him what he may honestly interpret as an authority to put his name to the petition ; and so, upon proof of a casual conversation on the public highway, in which the minds of the interlocutors have not in truth met, as remembered and interpreted by one, this may be effectual to bond a municipality to the extreme limit authorized by law.

Proof of one signature thus made, if allowed, may turn the scale and give the decision in favor of bonding ; but if one tax-payer may thus be made a petitioner in his absence, every signature may thus be made, and the municipality will be

bonded, not upon the written petition, but proof of the verbal assent of the individuals. This was not the intention and is not the spirit of the act. To give it such an effect would be to deprive the public of the safeguards prescribed by the act, and the tax-payers of all opportunity for that deliberation and discretionary action implied in the requirement of a written petition.

An examination of the evidence discloses some circumstances which should cause distrust of all signatures made pursuant to verbal authority.

It is well known that the location of the route of the road to be aided has much to do with the consent of the tax-payers, and in this, as in every other case, although it is not directly proved that promises were made or verbal consents given, conditioned upon the route, there is enough appearing to indicate that possibly conditional consents may have been obtained, and afterwards acted upon, upon the idea that the road was or would be located to meet the views of the individual thus consenting.

Because proof of these signatures was received, and the names of the individuals counted and allowed by the judge, as well as for the other reasons assigned by my brother GROVER, I am for affirming the judgment of the Supreme Court.

The proceedings ought not to be sent back for a rehearing. Such a discretion should be exercised cautiously, and generally only when the error has been technical and not substantial. In this case it is very evident that at the time of the hearing the requisite number of tax-payers, representing the proper amount of the taxable property of the town, had not consented to the bonding. Since the institution of the proceedings, as appears by the record, some of the petitioners have removed or cannot be found, and others have died, and doubtless there has been a change in many other property interests.

A new assessment roll and tax list has been made, and it is far preferable and eminently just that those now interested in the taxation of the property in the town should be heard, and that the proceedings should be commenced *de novo*.

## Statement of case.

All concur with GROVER, J. All except GROVER and PECKHAM, JJ. (who express no opinion as to the positions taken by Judge ALLEN), concur with ALLEN, J.

Judgment affirmed.

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AUGUSTINE W. DABY, Respondent, v. JOHN ERICSSON,  
Appellant.

In an action upon a chose in action or demand belonging to a partnership, the surviving partner is the real party in interest, although, under an arrangement between the partners, the representatives of a deceased partner are entitled to the proceeds thereof. The test is, was it partnership property at the death of the deceased partner. If so, the debtor cannot insist that such representatives be made parties.

The right of assignment is incident to the legal title, and the debtor may not question the consideration therefor.

Declarations or admissions of the surviving partner, relating to his construction of the partnership arrangement, to the effect that he claimed no pecuniary interest in a judgment recovered by his firm, and that the representatives of a deceased partner were entitled to it, do not show want of title in such survivor.

When there is evidence tending to show the place of residence and death of one partner, proof of the death at the same place of a person bearing the same name, establishes, *prima facie*, the title of the other partner as survivor.

Mere lapse of time, less than twenty years from the rendition of a judgment, does not raise a presumption of payment.

Evidence of the pecuniary ability of the defendant, for many years after the recovery of a judgment against him, does not tend to show payment, and is immaterial.

(Argued June 12th; decided June 22d, 1871.)

APPEAL from an order of the General Term of the Supreme Court in the first district, affirming a judgment entered upon a verdict for the plaintiff for \$5,372.13, rendered by direction of the court.

The action was brought upon a judgment recovered, December 8th, 1846, against the defendant, for \$3,013.11, by Charles Dimmock, William A. Spark, and Francis B. Dean, Jr., in

## Statement of case.

the Superior Court of the city of New York, upon which, it was admitted, the sum of \$1,000 was paid November 13th, 1847. It was commenced August 9th, 1866.

The plaintiff claimed title under an assignment executed by Dean, as survivor of Dimmock and Spark. On the trial, Dean was examined by commission as a witness for the defendant, and in answer to the fourth interrogatory, as to "where, when, and how, if ever," he conveyed the judgment in suit to the plaintiff, he testified that the counsel for Mrs. Charles Dimmock applied to him to make such transfer; and added: "I declined to do so without the request of Mrs. Dimmock, saying that, although I had no pecuniary interest in the judgment, yet, that I would not transfer it without the permission of Mrs. Dimmock, knowing that she was entitled to it as the representative of her husband, Charles Dimmock [he being dead, and Spark also, who was the other partner in the concern of Dimmock, Spark & Dean. I had no interest in the judgment, because, by the agreement between us, I had an interest only in the profits, and not in the property of the concern]." He further testified, that subsequently, on the application of Mrs. Dimmock, he executed the assignment to the plaintiff, receiving no consideration therefor.

The defendant objected to the words inclosed in brackets above, but the objection was overruled, and that part of the answer was read in evidence by the plaintiff's counsel.

The other facts, so far as material to the law of the case, appear from the opinion of the court.

*E. Sprout*, for the appellant, on the question of survivorship, cited *Bac. Abr.* "Joint. Ten." I., 1; *Com. Dig.* "Estate" K., 8; *Chitt. Gen. Pr.*, 102; *Story on Part.*, §§ 89, 90; *Blood v. Goodrich* (9 Wend., 76); *Tyler v. Taylor* (8 Barb., 585); *Miller v. Smith's Exs.* (16 Wend., 441); *Hudson v. McKenzie* (1 E. D. Smith, 358); *Gock v. Keneda* (29 Barb., 120); *Coolidge v. Ruggles* (15 Mass., 388); *Greenby v. Wilcox* (2 John., 4); *Zabriskie v. Smith* (3 Kern., 337.) As to proof of death, he cited *Greenl. Evi.*, vol. 2, § 278, d; *Hub-*

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back on Succession, pp. 103, 464, 465, 466. That payment is presumed from lapse of time. (*Miller v. Smith's Ecs.*, *supra*; *Jackson v. Pratt*, 10 John., 382; *Ears. of Clark v. Hopkins*, 7 John., 556; *Rex v. Stephens*, 1 Burr., 434; *Lealey's v. Noyes*, 7 Serg. & R., 410; *Jackson v. Sackett*, 7 Wend., 100; *Blanchard v. Noyes*, 3 N. H., 518; *Blackett v. Wall*, 3 Man. & Ryl., 119; *Austin v. Tompkins*, 3 Sandf., 25.) As to the declarations or admissions of Dean, that he had no interest, he cited Cow. & Hill's Notes to Ph. Evi., 4th ed., vol. 1, pp. 527, 530, 531, 318. That the plaintiff was not the real party in interest. (*Cummings v. Morris*, 3 Bosw., 560; *Kilman v. Culver*, 24 Barb., 656; *Hastings v. McKinley*, 1 E. D. Smith, 273; *Selden v. Pringle*, 17 Barb., 468; *Lenonde v. Dunham*, 1 Hilt., 114; 2 Story Eq., § 1047; *Clark v. Mauran*, 3 Paige, 373.)

*W. F. Shepard*, for the respondent, insisted, among other things, that there was no presumption of payment on the facts in this case. (*Ingraham v. Baldwin*, 9 N. Y., 45; *Miller v. Smith*, 16 Wend., 425; *Waddels Adr. v. Elmen-dorf's Adr.*, 10 N. Y., 170.) That the plaintiff was the real party in interest. (*Peterson v. Commercial Bk.*, 32 N. Y., 21; *Myers v. Machad*, 6 Abb., 198; *Consident v. Brisbane*, 22 N. Y., 389.)

ANDREWS, J. The exception to the admission of the part of the answer of the witness, Dean, to the fourth direct interrogatory, was not well taken, for two reasons; first, the evidence was material, and the objection was general and did not indicate the ground which is now taken, viz., that the answer was not responsive; and, *second*, the portion of the answer objected to was explanatory of a prior statement, made in the same answer by the witness, that he had no pecuniary interest in the judgment, and that Mrs. Dimmock was entitled to it as the representative of her husband.

This part of the answer was subject to the same objection now made to the part objected to, and the defendant could not read the one part and reject the other.



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This testimony tended to establish two facts; *first*, the death of Spark and Dimmock, the co-obligees of Dean in the judgment against the defendant, before the assignment by Dean to the plaintiff, and, *second*, that the consideration of the judgment was a copartnership demand of the firm of Dimmock, Spark & Dean, the plaintiffs therein.

In addition to this proof of the death of Spark, the will of a person of the same name, made at New Orleans in 1847, and admitted to probate in the County Court of Southampton county, Virginia, in 1848, disposing of real and personal estate in that county, was produced and proved on the trial.

The death of a Charles Dimmock at Richmond, in 1863, was shown, and it appeared from evidence offered by the defendant, that a payment made on the judgment, in 1847, was sent to Charles Dimmock at that place.

The answer avers that the plaintiffs in the judgment were residents of the State of Virginia at the time it was recovered.

The evidence in the case was sufficient to establish *prima facie* that the demand on which the judgment was recovered was a copartnership demand, and that Dean, at the time of his assignment to the plaintiff, was survivor of the firm.

Upon these facts, the right of Dean, as survivor, to assign the judgment was undoubted.

Upon the death of one partner, the demands and choses-in-action of the copartnership belong to the surviving partners, and they possess the sole and exclusive right to reduce them to possession, and when recovered they stand as trustees for the representatives of the deceased partner to the extent of his interest.

The law not only vests the legal title to the choses-in-action in the surviving partner, but it casts upon him the duty to get in the debts and settle the affairs of the partnership. The *jus accrescendi* exists for this purpose. (Story on Part., 346; *Murray v. Mumford*, 6 Cow., 441; *Peters v. Davis*, 7 Mass., 257; *Jarvis v. Hyer*, 4 Dev., 367.)

The right to assign is incident to the possession of the legal title, and a defendant in an action by the assignee cannot

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question the consideration upon which it was made. (Story on Part., § 115; *Peterson v. The Chemical Bank*, 32 N. Y., 21.) The Code has not changed the rule upon this subject.

The survivor of a firm is the real party in interest to a demand owned by or due to the firm. The debtor cannot, when sued by the survivor, object that the representatives of the deceased partner are not made parties with the survivor. Their equity is to have an accounting and adjustment of the affairs of the partnership, and they have no specific interest in the debt sued upon, but in a residuum, which is uncertain and contingent.

It is not material, upon the question of the capacity of the surviving partner to maintain an action for the partnership demand, that the beneficial interest in the claim was by the arrangement between the copartners in the deceased, or that upon an accounting his representatives would be entitled to the proceeds.

The test is, was the demand at the time of the death of the copartner a copartnership demand? If it was, the survivor takes the legal title with its incidents, however limited his equitable interest may be, and notwithstanding on an accounting nothing might remain to him. (*Clark v. Howe*, 23 Me., 560.)

The defendant in this case sought to maintain the claim that Dean, the surviving partner, had no interest in the judgment and could not assign it to the plaintiff, upon proof that by the copartnership agreement between Dimmock, Spark & Dean, the latter had an interest in the profits, and not in the property of the concern.

But the debt against the defendant was treated by the firm as a partnership demand, and judgment was recovered upon it as such.

Dean was liable for the debts of the firm, and had an interest in having them paid out of the assets, and the profit to which he was entitled could only be ascertained after the collection and application of the firm property.

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Opinion of the Court, per ANDREWS, J.

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The testimony and declarations of Dean, as to his interest in the judgment, had relation to his construction of the copartnership agreement, and did not tend to establish a want of legal title in him at the time of his assignment to the plaintiff.

The mere lapse of time between the rendition of the judgment and the commencement of the suit upon it, raised no presumption that it had been paid. (*Ingraham v. Baldwin*, 9 N. Y., 45; *Miller v. Smith's Exs.*, 16 Wend., 425.)

The offer to show the pecuniary ability of the defendant, and that, since 1849, he had been possessed of a large property, did not tend, we think, to establish the plea of payment, and was properly overruled.

If payment had been enforced by legal process, it could have been established by record evidence.

The plaintiffs in the judgment resided in another State.

If the judgment had been paid, some evidence of the fact, it may reasonably be supposed, would have been retained by the defendant, or the judgment would have been satisfied.

The case of *Miller v. Smith*, *supra*, to which we have been referred, is quite different in its circumstances from this, and is not an authority for the admission of the evidence offered.

There are no other questions in the case which we deem it important to notice, and as no error appears to have been committed on the trial, the judgment should be affirmed with costs.

All concur except ALLEN, J., not voting.

Judgment affirmed.

## Statement of case.

CHARLES LOUGHRAN, Appellant, v. WILLIAM S. ROSS,  
Respondent.

If a tenant, having the right to remove fixtures erected by him on the demised premises, accepts a new lease of such premises, including the buildings, without reservation or mention of any claim to the buildings, and enters upon a new term thereunder, the right of removal is lost, notwithstanding his actual possession has been continuous.

The subsequent removal of such erection by the tenant, before expiration of the second term, being without legal right, is not a breach of covenants of seizin and for quiet enjoyment in a deed by the landlord.

(Submitted June 12th; decided June 22d, 1871.)

APPEAL from an order of the General Term of the Supreme Court, in the first district, affirming a judgment dismissing the complaint, with costs. .

Action for breach of covenant of seizin and quiet enjoyment in a deed of two lots on Seventh avenue and Fifty-fifth street, New York, "with the corner house, and the house on the adjoining lot." The deed was made January 11, 1866, the premises then being in the occupancy of tenants under the defendant. Up to May 1st, 1865, the premises had been under lease for a term of years, and the buildings on the lots had been erected by the tenants. On the expiration of these leases, and on the 1st of May, 1865, the defendant had leased one of the lots to the former tenant, or to one occupying under or by assignment from the former tenant, for one year, by parol, rent payable quarterly in advance; and on the 4th of April had demised the other lot, by written lease, to the former tenant, for three years, at a specified rent, payable quarterly in advance, with a provision that, in case of a sale of the premises, the lease should, at the option of the purchaser, be converted into a lease from month to month, and the lessee covenanted, at the expiration of the time, to surrender the premises in as good state and condition as reasonable use and wear would permit, damages by the elements excepted. After the conveyance to the plaintiff, and before

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the first of May thereafter, the buildings were removed by the tenants, or some one claiming under them, they claiming the right to remove them. The plaintiff taking the same view of the rights of the tenants, brought this action to recover the value of the buildings, and on the trial at the circuit, in New York city, was nonsuited; and the nonsuit being sustained by the Supreme Court in banc, the plaintiff has appealed to this court.

*Alfred Roe*, for the appellant, as to the effect of re-letting, cited *Penton v. Hobart* (2 East, 88); *Werton v. Woodcock* (7 M. & W., 14); *Ombony v. Jones* (19 N. Y., 234); *Minshell v. Lloyd* (2 M. & W., 456); *Lynde v. Russell* (1 B. & A., 394); *Leader v. Homewood* (5 C. B., N. S., 456); *Whipley v. Dewey* (8 Cal., 36); *Shepard v. Spaulding* (4 Met., 416); *State v. Elliott* (11 N. H., 540); Taylor, L. & T., 404; *Devin v. Dougherty* (27 How., 455).

*Peter B. Ross*, for the respondent, to the same question, cited Ferrard on Fixtures, 72, 79, 217; Taylor, L. & T., 548, 551, 552; Smith, L. & T., 349; Woodfall, L. & T., 218; Holthouse Law Dic., 261; 2 Bouv., 3, 4; 17 Abb., 360; 10 Bosw., 537; 1 Daly, 325; 7 Barb., 263; 35 id., 58; 41 id., 231.

ALLEN, J. It is not claimed by the defendant that the tenants occupying the premises for the terms ending on the 1st of May, 1865, having erected the buildings during their tenancy, might not, during the continuance of their terms and their occupancy under the first leases, have removed the buildings; and the plaintiff does not deny, that after the expiration of the terms, and the tenants had ceased to occupy as tenants, their right to remove the buildings would have been lost; that a surrender of the premises would have been an abandonment of the claim to the buildings, and they would have become the property of the landlord as a part of the realty. The material question in the case is, as to the effect

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Opinion of the Court, per ALLEN, J.

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of the second letting and occupation under it, after the expiration of the first leases, upon the rights of the tenants and the ownership of the buildings. The rule is, that whatever fixtures the tenant has a right to remove must be removed before his term expires, except when the time at which the term will end is uncertain, depending upon a contingency, and it may be determined unexpectedly to the tenant, in which case he may be entitled to a reasonable time for removing fixtures after the expiration of the tenancy. (*Ellis v. Paige*, 1 Pick., 43; *Reynolds v. Shuler*, 5 Cow., 323.) The rule may be subject to the further qualification, that the right to remove the fixtures is not lost to the tenant so long as his possession *as tenant* continues; and the claim of the plaintiff is, that this qualification includes and saves the right of a tenant continuing in possession under a new lease. The right of the tenant to remove is a privilege conceded to him for reasons of public policy, and may be waived by him, and will be regarded as abandoned by any acts inconsistent with a claim to the buildings as distinct from the land, and upon abandonment of the right by the tenant, fixtures erected by him immediately become the property of the landlord as a part of the land. A surrender of the premises, after the expiration of the lease, is such an abandonment as vests the title in the landlord. In reason and principle the acceptance of a lease of the premises, including the buildings, without any reservation of right, or mention of any claim to the buildings and fixtures, and occupation under the new letting, are equivalent to a surrender of the possession to the landlord at the expiration of the first term. The tenant is in under a new tenancy, and not under the old; and the rights which existed under the former tenancy, and which were not claimed or exercised, are abandoned as effectually as if the tenant had actually removed from the premises, and after an interval of time, shorter or longer, had taken another lease and returned to the premises. A lease of lands and premises carries with it the buildings and fixtures on the premises, and the tenant, accepting a lease of the premises without

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Opinion of the Court, per ALLEN, J.

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excepting the buildings, takes a lease of the lands with the buildings and fixtures, and acknowledges the title of the landlord to both, and is estopped from controverting it. In respect to the lot of which there was a written lease for the new term, the tenant expressly covenanted to surrender the premises, at the end of the term, "in as good state and condition as a reasonable use and wear thereof will permit, damages by the elements excepted;" and this covenant relates to and includes the buildings then on the premises, and if they are excluded from its operation it can have no effect. It follows that the tenant becoming a party to that lease, and occupying under it, is estopped from claiming the buildings as his own, for he has covenanted to surrender them, as a part of the premises and included within the general description, to the landlord at the end of the term, in good repair. Such is also the implied undertaking of the tenant taking a new lease by parol. Elementary writers are very well agreed that, when a tenant continues in possession under a new lease or agreement, his right to remove fixtures is determined, and he is in the same situation as if the landlord, being seized of the land with the fixtures, had demised both to him. (Taylor's L. and T., 91; Gibbons' Law of Fixtures, 42; and Grady's Law of Fixtures, 98.) And it would seem that the position is warranted by authority. When the tenant continues in possession after ejectment brought by the landlord, under an arrangement with him, and with his assent to a stay of execution, the tenant's right to remove buildings from the premises, erected by himself during his lease, is gone. (*Fitzherbert v. Shaw*, 1 H. Black, 258.) The court held that there was an implied agreement that the tenant should deliver up the premises in the same condition as they were in when the agreement was made. The same was held in *Heap v. Barton* (12 C. B., 274), JERVIS, Ch. J., saying: "If the tenants meant to avail themselves of their continuance in possession to remove the fixtures, they should have said so." The general form of expressing the right of the tenant to remove fixtures, is that they must be removed within the term; that

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Opinion of the Court, per ALLEN, J.

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is, the term during which they were erected, and unless the lessee uses, during the lease, the privilege to sever them, he cannot afterwards do it. (*Lee v. Risdon*, 7 Taunt., 188; *Lyde v. Russell*, 1 B. & Ad., 394.) But it may be done so long as the possession continues, although the term may have ended, if there has been no new agreement. (*Penton v. Robart*, 2 East, 88.) A case somewhat analogous in principle to this was that of *Thresher v. Proprietors of the East London Water-works* (2 B. & C., 608), in which it was decided that a lessee, who had erected fixtures, for the purposes of trade, upon the demised premises, and afterwards took a new lease, to commence at the expiration of the former one, which new lease contained a covenant to repair, was bound to repair those fixtures, unless strong circumstances existed to show that they were not intended to pass under the general words of the second demise, and a doubt was expressed whether any circumstances, dehors the deed, could be alleged to show that they were not intended to pass.

ALDERSON, B., in *Weeton v. Woodcock* (7 M. & W., 14), says: "The rule, to be collected from the several cases decided, seems to be this; that the tenant's right to remove fixtures continues during his original term, and during such further period of possession by him, as he holds the premises under a right still to consider himself a tenant," and the right to remove the fixtures was denied to the assignees of the tenant, although they retained the possession, the plaintiff having made an entry to enforce a forfeiture. (See also *Minshall v. Lloyd*, 2 M. & W., 450; *Shepard v. Sparulding*, 4 Metc., 416.) The tenants, holding under a new demise, had not the legal right to remove the fixtures put by them on the premises during a former term, there being no mention of the right in the second lease. The offer to prove that, by custom in the city of New York, tenants had a right to remove buildings, did not go beyond the right conceded by the defendant. The evidence, therefore, if otherwise competent, could not have aided the plaintiff.



## Statement of case.

The difficulty is, that the conceded right was abandoned and lost by its non-exercise during the tenancy under which the buildings were erected. The remedy of the plaintiff was against the persons wrongfully removing the buildings, and not on the defendant's covenant.

The judgment should be affirmed.

CHURCH, Ch. J., FOLGER and ANDREWS, JJ., concur;  
GROVER and PECKHAM, JJ., dissent.

Judgment affirmed.

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THE MANHATTAN BRASS AND MANUFACTURING COMPANY v.  
HERMAN B. SEARS, impleaded with FREDERICK JUDSON,  
Respondent.

An agreement for sharing in the profits of a business is sufficient to constitute a partnership, as to third persons. It is not necessary that the agreement be to share in the losses also.

(Argued June 13th; decided June 22d, 1871.)

APPEAL from an order of the General Term of the Superior Court of the city of New York, affirming a judgment of the Special Term dismissing the complaint.

Action to recover a balance of rent upon a lease of certain premises in the city of New York, executed by the plaintiff, lessor, to the "Judson Horseshoe Company, lessee," signed on the part of the lessee "F. Judson, president."

The defendant Judson being the owner of a patent right, on the 22d of June, 1866, entered into the following agreement with the defendant Sears:

"This agreement, made at the city of New York, this 22d day of June, 1866, between Frederick Judson, of Jersey City, in the State of New Jersey, and Herman B. Sears, of the city of New York, witnesseth that the said Frederick Judson, being the sole owner in his own right of the patent right for the improvement in horseshoe calks, for which a patent was

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Statement of case.

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granted by the United States, May 22d, 1866, and the same being free and clear from all liens and encumbrances, hereby agrees to sell, and does sell and convey to Herman B. Sears, a one undivided quarter interest in said patent right, for the loan of \$4,000 in cash, for the purposes of the patent, and at the risk of its success, and the sum of \$15,000 purchase-money. The said \$4,000 loan is to be paid at any time within one year, to be used for the benefit of the patent, and returned out of the first profits of the business, after paying the salary of the agent and other necessary expenses. The said \$15,000 purchase-money is to be paid as follows, viz., to be realized and retained by the said Frederick Judson out of Herman B. Sears' share in the profits arising from the sale of rights under the patent, and one-half of all dividends payable to the said Herman B. Sears are to be retained by said Frederick Judson until they amount to said \$15,000. The said Frederick Judson is to continue to be the sole agent of the whole of said patent right, at a salary of \$1,500 a year, payable only from the profits of the whole of said patent right, subject to an increase hereafter to be agreed upon, whenever the said \$15,000 shall be realized, and the profits of the business shall authorize it. The object of this agreement is not for any purpose of business, or manufacture, or partnership, but only to make the parties joint owners of said patent right. The said Frederick Judson is to transact all business, and make all grants in his own name, and to keep books of account showing all moneys received and expended in said matters, which are to be always open to the inspection of either of the parties to this contract.

"FREDERICK JUDSON.

"HERMAN B. SEARS."

In October of the same year, the defendant Judson hired from the plaintiff premises in the city of New York until May 1st, 1868, which were used for the introduction and exhibition and sale of patent rights. It appeared that some rent on this lease had been paid by an order upon the defendant Sears in favor of the plaintiff, drawn by Judson, out of the \$4,000 agreed to be paid by Sears, which

## Opinion of the Court, per PECKHAM, J.

Sears admitted he supposed was for that purpose when he paid it. The defendant Sears alone defended, and put in a general denial. Evidence was given to show that the defendant Sears told the plaintiffs' president, before the lease was signed, that he knew the Judson Horseshoe Company; that it owned a patent worth \$1,000,000; that he owned the quarter of the interest in that patent, in the concern of the Judson Horseshoe Company.

The defendant Sears moved to dismiss the complaint, but without stating any ground of such motion. The court granted the motion, and the plaintiffs excepted. Judgment was entered accordingly, and the plaintiffs appealed to the General Term of the Superior Court, where the judgment was affirmed. The case below is reported 1 Sweeny, 426.

*S. B. Brownell*, for the appellant, cited Col. on Part., § 3; 3 Kent, 5th ed., 24; Story on Part., §§ 2, 34, 35, 59, 60, 68; *Ex parte* Langdale, 18 Ves., 300; *Wood v. Vallette* (7 Ohio St., 192); *Hazard v. Hazard* (1 Story, 371); *Waugh v. Carver* (2 H. Bl., 247); *Gray v. Smith* (2 Wm. Bl., 998); *Ex parte*, *Hamper* (17 Ves., 403); *Champion v. Bostwick* (18 Wend., 175); *Catskill Bk. v. Gray* (14 Barb., 471).

*Charles E. Whitehead*, for the respondent, cited *Parkhurst v. Kinsman* (1 Blatchford, 488); *Pitts v. Hall* (3 id., 201).

PECKHAM, J. To constitute one a partner, as to third persons, it is not necessary that he should agree to share in the losses of the business. Sharing in the profits is sufficient. The reason is, that sharing in the profits deprives creditors of part of the means of payment. (*Pott v. Eyton*, 3 Man. Gr. & S., 32; 54 C. L. R., 31; Col. on Part., 5, 4th Am. ed., and cases cited; Story on Part., Gray's ed., § 2, where definitions of partnership are given by different writers.) More generally no allusion is made to sharing losses. (And see section 68; 3 Kent, 8th ed., 26; *Grace v. Smith* 2 W. Bl., 998).

Here seem to be all the elements of a partnership, as claimed by any writer :

1st. Sharing in the profits.

2d. Sharing in the losses, at least, to the extent of \$4,000, the repayment of the whole of which depended upon the profits.

3d. The right to inspect the books. (Story on Part., § 69, note 1.)

4th. A common interest in the stock of the company. (3 Kent, 24.)

It is not the less a partnership, that Judson was "to transact all business, and make all grants in his own name." A secret or dormant partner is always intended to be unknown. He is not thereby the less a partner.

It is urged that the respondent expressly refused, in the contract, to enter into any "business or manufacture or partnership." There is no such refusal. But the contract says simply that such was not the "*object* of the parties," but only to make the parties joint owners of the patent. Yet the contract carefully provides for the business, and for the disposition of its profits. It continues Judson as the sole agent of the whole of the patent right at an agreed salary, payable from the profits, subject to an increase thereafter to be agreed upon "whenever the \$15,000 shall be realized, and the profits of the business shall authorize it."

What the precise business is as to the patent is nowhere stated, except incidentally, viz., that "the profits arising from the sale of rights under the patent" are to be applied in a share for the defendant's benefit toward paying for an interest in the patent.

Nor is the business to cease when the one-third interest in the patent is paid for, as provision is expressly reserved for an increase of the agent's salary at that time.

Here, then, is express and particular provision for carrying on this business for the joint benefit of the parties, defendants, for sharing in the profits, and in a degree in the losses; and

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Opinion of the Court, per PECKHAM, J.

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the mere statement that its "object is not for a partnership," will not change the legal effect of the contract.

It is plainly a partnership as to third persons, even though expressly agreed that it should not be so between themselves. The best position that can be claimed by defendant Sears, is that this is a special or limited partnership, as between the parties thereto. In such case, it is general as to the public, or our statute on that subject would be superfluous. (Story on Part., § 63, and cases cited.)

Judson, therefore, was the agent of the defendants in all matters touching the business of the patent. It cannot be held, as matter of law, that the hiring of this store by Judson was not within, and for the purpose of the partnership business. If it were for manufacturing and exhibiting specimens of the patent's work, with a view of selling the rights, and it was pertinent to that end, then it was within the partnership business, though it may not have been a wise mode of attaining the end.

It may be possible that the steam power was outside of the business; and yet it would not then be proper to nonsuit, if the renting was appropriate as to the building or room, but if the general agent of the company thought it appropriate, and acted in good faith, it should be a plain case of excess of authority, or the company should be bound by his contract.

It may be observed that the defendant, Sears, loaned this \$4,000, "to be used for the benefit of the patent," and yet he paid a draft which he thought, as he testified, went for a payment on this same rent. He then, obviously, regarded this renting as appropriate to the business, or he would not, or should not, have consented to the misappropriation of his money.

The court erred in dismissing the complaint. Judgment reversed, new trial granted, costs to abide event.

All concur, except CHURCH, Ch. J., and ALLEN, J., not voting.

Judgment reversed.

## Statement of case.

## CHOLETTE SHARPE, Appellant, v. BENJAMIN F. FREEMAN and others, Respondents.

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In an action against the widow and children, and also the personal representatives of an intestate, to set aside a deed from such intestate to such widow and children, claimed to be fraudulent as against creditors, and for sale or mortgage of the lands so conveyed, to pay debts, the roll of a judgment recovered by the plaintiff, in an action against the personal representatives of such intestate, upon simple contract debts accrued before his death and before such deed was given, is not competent evidence against such grantees.

Such judgment does not render the claim of the creditor a judgment debt, as to the grantees or heirs-at-law of the intestate.

Nor does such judgment preclude the heirs-at-law from interposing the statute of limitations to the claims upon which it was recovered.

The practice of receiving evidence subject to objection, and reserving the question of its admissibility, on trials before referees, criticised.

(Argued June 14th; decided June 22d, 1871.)

APPEAL from an order of the General Term of the Supreme Court, in the seventh judicial district, affirming a judgment dismissing the complaint, entered upon the report of Sterling G. Hadley, Esq., referee.

The action was brought to set aside a certain conveyance of real estate, by Alvin H. Parks to the defendants, Susan Parks, Ellen Parks, and others, his wife and children, and have the premises declared subject to the debts of the grantor, and that a sale or mortgage be had, and the proceeds applied to the payment of such debts.

The deed was executed in 1854, and was without pecuniary consideration, though the consideration expressed was \$500. Alvin H. Parks died intestate in 1856, and the defendants, Freeman, Dickinson and Hiram Parks, and also the widow, Susan Parks, received letters of administration. Before this action was commenced, the administrators had a final settlement before the surrogate, and had paid out, in course of administration, all moneys received by them, as such, and had no property in their hands applicable to the payment of debts. They had paid about \$1,900 to the plaintiff, upon a

## Statement of case.

judgment recovered by him against such administrators, on a reference of his claims, agreed to under the statute.

At the time of his death the intestate was largely indebted to the plaintiff, on notes and book account, a portion of which indebtedness accrued prior to the above mentioned conveyance, and upon this indebtedness the plaintiff's judgment was recovered.

The lands conveyed were of the value of \$12,000. The plaintiff's judgment was for \$3,831.35. The total indebtedness of the intestate, as allowed by the surrogate, was \$30,000, of which the administrators paid nearly \$5,000.

The plaintiff made no proof of his debt upon the trial, except by producing the roll of the judgment so entered in his favor against the personal representatives, which was received by the referee, subject to the objections made by the defendants thereto. The judgment was recovered and docketed in 1858. This action was commenced in 1866.

The referee decided that the judgment "did not establish any indebtedness against the widow or heirs-at-law of the real estate held by them;" that the plaintiff had no legal, valid, subsisting debt against the estate, binding on the heirs or widow, or the real estate in their hands; that the plaintiff's claims were barred by the statute of limitations, and that the complaint should be dismissed.

The case below is reported, 2 Lansing, 171.

*Henry R. Selden*, for the appellant, cited *Chautauqua Co. Bank v. White* (6 N. Y., 252, 253); *Conro v. Port Henry Iron Co.* (12 Barb., 58); 2 Barb. Ch. Pr., 149; *Loomis v. Tiffit* (16 Barb., 541); *Walker v. Devereaux* (4 Paige, 252); 15 John., 380, 381; 3 Cow., 96; *Ball v. Miller* (17 How., 300); *Flora v. Carbeau* (38 N. Y., 113); *Elsev v. Metcalf* (1 Denio, 326); *Stanton v. Wetherwax* (16 Barb., 261).

*W. C. Rowley*, for the respondent, cited Willard on Executors, 315, and cases there cited; *Baker v. Kingsland* (10 Paige, 360); *Ferguson v. Brown* (1 Bradford's Sur. R., p. 10);

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Opinion of the Court, per FOLGER, J.

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*Renwick v. Renwick* (1 Bradford's R., 234); *Ball v. Ball* (17 How., 308); *Warren v. Paff* (4 Bradford R., 260); *Osgood v. Manhattan Co.* (3 Cow., 612); *Baker v. Kingsland* (10 Paige, 366); *Reynolds v. Collins* (3 Hill, 36); *Howell v. Babcock* (24 W., 488); *Bucklin v. Chapin* (1 Lans., 449); *Wiggins v. Armstrong* (2 John. Ch., 145).

FOLGER, J. When the referee admitted the judgment roll in evidence, "subject to the objections duly made by the defendants' counsel," the record was in evidence for all the legitimate purposes of the action. By receiving the roll in that way, the referee followed a practice which, as we understand, prevails in some parts of the State, in trials before referees. It is understood and agreed between the parties, that the validity of the objection is not at the moment determined. The determination of it is reserved by the referee to be made upon more mature consideration, before the delivering of his report, and his determination thereon to be explicitly stated in his report. If he shall, after the case is submitted, overrule the objection and consider the evidence, the party objecting to it is, by this practice, to have the benefit of an exception. If, on the other hand, he sustains the objection and rejects the evidence, the party offering it is to have the benefit of an exception. Such, we say, is understood to be a practice in some parts of the State. It is one not to be commended, however; for it does not conduce to a clear and accurate trial of the action, nor to an explicit presentation of the questions for review. If the referee, in his report, shall state what he has done in admitting or rejecting the evidence, and it shall appear, without question, in the case as made up, that he has ruled and an exception has been taken to his ruling, such exception may be considered on review. But if, when evidence has been received subject to objection, he shall have afterward either sustained or overruled the objection, and there does not appear in the case any exception by the party aggrieved, it may turn out that the party has no sufficient remedy. This case presents an instance. The



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Opinion of the Court, per FOLGER, J.

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plaintiff offered in evidence a judgment roll; the defendant made several objections; the roll was received subject to those objections. The plaintiff, whose evidence was in fact received, and is incorporated in the case now on appeal, claims that it was not considered by the referee; and one of his points is, that "the referee erred in rejecting the record in evidence against the heirs, after it had once been received in evidence and the cause was submitted to him." But there is nothing to show us that he rejected it in evidence. There is no exception to any rejection of it by him. He has reported, among his conclusions, certain statements as facts, which he could have derived only from the judgment roll. But in his conclusions of law, he makes no deduction from those facts, to the benefit of the plaintiff, as against the grantees of Parks. It is possible that, had a ruling been requested at the hearing, when the testimony was objected to, and it had been made, the plaintiff might have conducted the trial otherwise than he did. But his evidence was admitted. On the other hand, had the referee, receiving the evidence, given to it all the weight which the plaintiff claims for it, the defendant has no exception to its admission. Inasmuch, as a general rule, we are confined in our review to the errors of law, which are presented by exceptions made, it is evident that such a mode of trial of actions is hazardous.

The case is then before us with this evidence in it as the basis of facts found, but with conclusions of law, upon the facts found, adverse to the plaintiff. Did the referee commit any error thereby? We are of the opinion that he would have been right, had he ruled that the roll was not competent evidence against the grantees in the deed from Parks, as such. They were not, nor was either of them, in his own right, a party to that record, or a privy to it. At common-law, a judgment against executors or administrators was not evidence against the heir, nor was it in equity. (Willard on Ex'rs, 315, and case cited.) For there is no privity between the executor and the heir. And though the grantees in the deed were also the widow and the heirs-at-law of Parks, there

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Opinion of the Court, per FOLGER, J.

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is no privity which makes the judgment roll evidence against them, unless it is made so by statute. The statutes expressly provide that a judgment, docketed after the death of one against whom it has been obtained, or against his executors or administrators, shall not bind his real estate, but shall be held as a debt to be paid in the course of administration. (2 R. S., 359, § 7; 449, § 12; 355, § 24; 89, § 40.) The sections of the Revised Statutes do not give any competency to the records of such judgments, as evidence against heirs-at-law or grantees. The judgment, the roll of which was put in evidence in this case, was recovered against the administrators of Parks, upon a reference agreed to by them and sanctioned by the surrogate, in pursuance of the statute. (2 R. S., 89, §§ 36, 37). Chapter 460 of the law of 1837, provides for the mortgaging, selling or leasing of real estate of a deceased person for the payment of his debts. But it declares that, where a judgment has been got against an executor or administrator, the claim shall remain a debt to the same extent as before, to be established as if judgment had not been obtained. It excludes the idea that the judgment is evidence against the heir-at-law, or any grantee of the land, or that the claim assumes the character of a judgment debt. Chapter 172 of the Laws of 1843 added a *proviso* to chapter 460 of 1837, that where such judgment had been obtained on a trial or hearing upon the merits, it should be *prima facie* evidence of such debt *before the surrogate*. This still excludes the idea that it is evidence in any other court, or that the debt is yet a judgment debt. The heir-at-law may still contest the validity and legality of the debt, even on a proceeding before the surrogate, and may set up the statute of limitations in bar, and that notwithstanding any admission by the administrator. (2 R. S., 102, § 10.) There is nothing in the statutes which makes the judgment roll evidence against these grantees. Nor has the learned counsel for the appellant suggested to us any other provision of statute law. He asks, however, "would not a note of the intestate have been evidence, or a judgment against him?"

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Opinion of the Court, per FOLGER, J.

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Neither would have been conclusive against the fraudulent grantee, but certainly they would be admissible, and *prima facie* evidence of the facts shown by them. If a judgment against the intestate would be *prima facie* evidence, would not a like judgment against his administrator? If a note would be evidence, would not a judgment record reciting the note, and in which the note is merged, be evidence?" The instances put are not analogous. Where the signature of the intestate to the note is proven, it is the declaration or act of the one with whom the heir is in privity, and the proof is made in an action against the heir, in which he has his day in court. And so, when the judgment on the note against the intestate is shown, it is a judgment against one with whom the heir is in privity. That essential is lacking in this judgment.

And though one of the grantees (the widow of Parks) was also a defendant in the action in which the judgment was rendered, the roll of which was put in evidence, she was such in her representative capacity with the other administrators. As such she might not deny the validity of the claims of the plaintiff, then made against the personal representatives, and yet have a right to deny them when, eight years after, they are set up against her, in her own right, as the alleged fraudulent grantee of real estate. The plaintiff, in 1857 and 1858, may have had legal claims against the estate of the intestate, which an administratrix could not resist, save by proof of payment or set off. But when, in 1866, he comes to collect those claims from real estate, which has been conveyed to her by the intestate in his life-time, she may take the position that those claims, which were once enforceable against the administrator, are now barred by the statute of limitations, against heirs-at-law and grantees, and also that, though made the subject of a judgment by provision of statute, they are, by the same statute, precluded from becoming thereby judgment debts. The learned counsel for the appellant claims, however, that the judgment roll having been received in evidence, though objection was made by the

respondents, it cannot now be claimed that it was incompetent as evidence against them.

It is held, in *Flora v. Carbeau* (38 N. Y., 111), that where testimony tending to establish a material fact, although incompetent in its nature, is received without objection, or being objected to, is received, notwithstanding the objection, the party has a right to insist upon the facts shown thereby. Granting the whole force of the authority, the appellant cannot claim that any more was proven by the judgment roll than it was capable of proving. He can only claim that there are established in the action the facts shown thereby. That the roll was admitted in evidence did not make the debts, which were involved in the action in which that judgment was rendered, judgment debts. It did show that, in 1858, the plaintiff was the owner and holder of certain simple contract debts against the intestate, and that, in proceedings under the statute, he had established, against the personal representatives of the intestate, his right to the payment of them from the assets of the estate.

Certainly the plaintiff cannot claim that he stands in any better position than he would be in were there no deed from the intestate, and the title to the lands were on the record in his name. It is stated, indeed, that the purpose of the action may be to set aside the deed, so that application may be made to the surrogate to sell the lands, as real estate of the intestate, for the payment of his debts. If, however, the deed were set aside, or had never been, and the plaintiff were now making application to the surrogate for sale of the land, the heirs at law could contest his claim, and set up the statute of limitations against it. The judgment would be *prima facie* evidence of the debt, and no more. But, in making evidence that the debt ever existed, it would show that it was eight years since it was due, and also establish *prima facie* the defence of the statute, in favor of the heirs. It cannot prove more in this action.

It is said that the statute is not well pleaded by the defendants. The answer avers that they did not, nor did their intes-

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Opinion of the Court, per FOLGER, J.

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tate, become indebted to the plaintiff within nine years next preceding the commencement of the action, nor did they undertake or promise to pay the plaintiff, in the manner and form set forth in the complaint. The appellant contends that this answer does not negative the accruing of a cause of action within six years of the bringing of the action; that though the promise may not have been made nor the indebtedness begun within nine years, it may have been not until within six that the promise was mature or the indebtedness due and payable. But it will be observed that the answer denies the becoming indebted or promising in the manner and form set forth in the complaint. That manner and form is "in divers demands, notes and accounts, more particularly specified in the judgment roll," which, it is alleged, was filed and judgment docketed against the administrators on the 31st August, 1858. This is tantamount to an averment that the divers demands, notes and accounts were due and payable before the proceedings were commenced, which resulted in a judgment in August, 1858. The answer denying the becoming indebted and the promise and undertaking within nine years, in manner and form as set forth in the complaint, is tantamount to a denial that within nine years there was a becoming indebted and a promise and undertaking to pay the demands, notes and accounts, which became due and payable before August 1, 1858. From the two pleadings the issue is sufficiently definite to admit in proof the defence of the statute.

The judgment should be affirmed, with costs to the respondent.

All concur.

Judgment affirmed.

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Statement of case.

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JOHN ROBINSON, Respondent, v. HENRY WEIL, Appellant.

The addition of the words "per agreement" to the items of a bill of particulars, does not preclude proving and recovering the value of the services specified in such bill, although an agreement for the payment of a specified sum is not proved.

(Argued for the appellant, submitted by the respondent, June 14, 1871; decided June 22d, 1871.)

APPEAL from an order of the General Term of the Supreme Court, in the second district, affirming a judgment entered upon a verdict in favor of the plaintiff.

The plaintiff sued the defendant for services as a physician; the complaint being for medical and surgical services, etc., generally. The defendant answered by a general denial.

The plaintiff's attorney served upon the defendant's attorney a bill of particulars, the first item of which was as follows: To professional services from December 23d, 1867, to February 19th, 1868, per agreement, \$500.

Upon the trial the defendant admitted the second and third items of the bill of particulars, amounting to sixty-seven dollars, and the parties went to trial upon the first item only.

The plaintiff, testifying on his own behalf, stated that he took charge of the defendant's case upon the express agreement that he should be paid \$500, or \$1,000, according to the length of time; that the defendant went under his treatment, and continued from December 23d, to February 19th following, and that he charged the defendant \$500, the minimum sum.

The plaintiff's counsel here asked the witness what these services were worth. The defendant's counsel objected to the question, upon the ground that the plaintiff had, by his bill of particulars, limited his claim to the special agreement for \$500. The court sustained the objection, and excluded all evidence of the value of the services, by either side.

The only other evidence was that of the plaintiff's son, who testified, substantially, the same as his father, and that

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Opinion of the Court, per RAPALLO, J.

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of the defendant, who contradicted them both in the most positive and unqualified manner.

The court charged the jury, substantially, that if they found that the agreement claimed by the plaintiff was not made, "then you have to inquire into the value of the services, and give the plaintiff a verdict for such amount as you consider the services reasonably worth." The defendant's counsel excepted to this part of the charge.

The court further charged, "that the evidence of what Dr. Robinson said he would charge, is some evidence of what his opinion is as to the value of the services." The defendant's counsel excepted to this part of the charge. The jury rendered a verdict in favor of the plaintiff for \$556.

*A. C. Morris*, for the appellant.

*Crooke, Bergen & Pratt*, for the respondent.

RAPALLO, J. We are of opinion that the plaintiff was not precluded, by the form of his bill of particulars, from proving and recovering the value of the services, though he should fail to prove an agreement for the payment of a specified sum therefor. The bill of particulars specifies the nature of the services, and the dates between which they were rendered and the amount claimed, and, in those respects, limited the plaintiff's proofs; but the addition of the words "by agreement," did not restrict him to proof of a special agreement fixing the price.

The charge would have been correct in so far as it authorized the jury, in case they did not find the contract, to find the value of the services, had there been, independently of the alleged contract, any evidence of such value, upon which a verdict could be based. But the judge had excluded evidence on either side as to value, and none was given. In the absence of such evidence, it was error to submit the question of value to the jury independently of the question of contract.

## Statement of case.

What Dr. Robinson said he would charge was not evidence on the question of value, nor did it legally prove even what his opinion was on that subject. His sworn testimony, as to the value of his services, would have been competent, but his unsworn statement was not.

As, under the charge of the court, the verdict may have been based upon the supposed value of the services, and not upon a finding of the special contract, the judgment should be reversed, and a new trial ordered, with costs to abide the event.

All concur. Judgment reversed and new trial granted.

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THE PEOPLE OF THE STATE OF NEW YORK ex rel. CYRUS E. DAVIS, Appellant, v. HIRAM GARDNER, Respondent.

The time of the adoption of article 6 of the Constitution, intended by the references thereto in that article, is January 1st, 1870.

A county judge, chosen at the general election in November, 1869, and having taken the oath of office, was "in office at the adoption of this article," and entitled to hold his office for the full term of four years thereafter.

The limitation as to age, expressed in section 13 of that article, applies to county judges, but not to those in office January 1st, 1870, the express language of section 15, that such judges "shall hold their office until the expiration of their respective terms," being controlling.

(Argued June 9th; decided June 22d, 1871.)

APPEAL from an order of the General Term of the Supreme Court in the fourth department, affirming a judgment in favor of the defendant, rendered on a trial by the court, without a jury.

This is an action in the nature of a *quo warranto*, commenced and prosecuted pursuant to sections 428 to 448 of the Code, to oust the defendant from the office of county judge of Niagara county, and to install the relator into the office.

The defendant was appointed, by the governor, county judge of that county, on November 17, 1868, to fill a vacancy



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Opinion of the Court, per FOLGER, J.

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occasioned by the resignation of Judge LAMONT, who was elected in 1865, and whose term would expire December 31, 1869.

The defendant was duly elected to the office at the general election in November, 1869, took the oath of office, and, on January 1st following, entered upon and yet continues in the discharge of the duties thereof. No question is made as to the regularity of the election.

The defendant became seventy years of age on February 9, 1870.

At the general election in November, 1870, the relator received 2,840 votes for that office, being all the votes given therefor but one; the average number of votes given in the county, for other officers voted for, being 9,122.

*Marshall B. Champlain, Attorney-General, and the Relator in pro. per., for the appellant.*

*Mortimer M. Southworth and Geo. F. Comstock, for the respondent.*

FOLGER, J. The defendant, at the time of the general election in November, 1869, was holding the office of county judge of Niagara county, by virtue of a valid appointment from the governor. His term of office would expire on the 31st day of December, 1869. At that general election, he was chosen, by the electors of the county, to the same office for the term of four years from the 31st of December, 1869. At the same election at which he was thus chosen, the electors of the State expressed their assent to the judiciary article of the proposed Constitution. That the electors of the State had so expressed their assent, was determined and declared by the board of State canvassers in December, 1869. It is held in *Real v. The People* (42 N. Y., 270), that the canvassing of the votes, and the determination and declaration of the result by the board of State canvassers, was the adoption by the people provided for in the fifth section of the

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Opinion of the Court, per FOLGER, J.

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fourteenth article of the instrument proposed to the people as a new Constitution. That section reads as follows: "Sec. 5. This Constitution shall be in force from and including the first day of January, *next after its adoption by the people*, except as herein otherwise provided." And it was held in that case, that the people voting upon the whole instrument, though they assented to but one article of it, must have assented to that, in view of the time for it to go into effect, declared by the fifth section above quoted. And that the judiciary article, therefore, was in force, as a part of the Constitution of the State, on the first day of January, 1870, and not before that. The decision was concurred in by all the judges, but one, who did not sit. There is no reason to doubt its soundness. It must be taken as established, that the new judiciary article took effect upon the 1st day of January, 1870, and on and from that day became operative as a provision of organic law. By the fifteenth section of that article, it is provided as follows: "The *existing* county courts *are continued*, and the *judges thereof*, *in office at the adoption of this article*, shall hold their offices until *the expiration of their respective terms*. Their successors shall be chosen by the electors of the counties for the term of six years."

The question is now presented, to which of the terms of office of the defendant does this provision apply? Shall he hold the office until the expiration of four years from the 31st December, 1869, or shall he be limited to that term of office which expired on that day? The relator claims that the last is the true position. And the argument to maintain it is mainly founded upon the phrase, "*at the adoption of this article*," found in the fifteenth section. But confining our consideration to this one phrase, we can but notice, that there is a distinction indicated in the instrument proposed as a new Constitution, and that there is reason to believe that there are two acts and periods of adoption spoken of by it. In this fifteenth section, and in other sections (§§ 2, art. 2; 4, art. 3; 9, art. 4; 8 art. 5; 7, 12, 13, 24, art. 6; 6, art. 7; 1, art. 11), the phrase is used generally, without qualifying or

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Opinion of the Court, per FOLGER, J.

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explanatory words, but in the fifth section of art. 14, it is made particular, by the coupling with it of the phrase "*by the people*." The use of the last phrase, in connection with the word adoption ("next after its *adoption by the people*"), would indicate a change in the meaning of the draftsman, and an intention then to point to an act and time of adoption different from that designated by the unqualified use of the word in the former sections. We cannot suppose that the words "by the people," were used idly, and not charged with some meaning. And holding that they were used of a purpose, they must carry with them evidence of an intention to indicate a different act and time from that which had been pointed out in the previous sections by the use of the word adoption, with no qualifying phrase attached to it. And, indeed, that there should be such a change of intention, runs with the current of reason. For we must perceive that there can but be an act of the people, as a political body, which had a prior part to do, in the expression of assent and ratification of the proposed article. This was to be shown by ballots cast, afterward to be counted. Various official acts must be performed, before the result of the action of the people could be authoritatively and definitely ascertained and declared. And in the nature and necessity of things, in any prudent forecast, there should be a later and a fixed, definite time, of which all should be beforehand apprized, when, in pursuance of that result, the partial system of fundamental law assented to by the people should have its adoption into the whole Constitution, as an operative part of it. Words may not be forced away from their proper signification, to one entirely different. (2 Parsons on Cont., 495.) But that we do not seek to do. It is easy to know what the word adoption means. That is not the question. What we are to determine is, not what the word means, but whether in its use, in different parts of the instrument, the framers thereof did not intend to indicate different acts and different times, as fixed by different acts. In the fifth section of the fourteenth article, the adoption by the people means

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Opinion of the Court, per FOLGER, J.

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the affirmative expression of assent, by the electors, to its becoming a part of the organic law. In the other sections of the instrument, it means that time when it takes effect and is adopted into and made part by adoption of the complete constitutional system of the State. But let us go a step further, and beyond the consideration of one phrase, view the whole sentence in the fifteenth section in which that phrase occurs. It reads thus: "The existing county courts are continued, and the judges thereof, in office at the adoption of this article, shall hold their offices until the expiration of their respective terms." Now, when this sentence speaks of "the existing county courts," it must mean the county courts existing when the article went into effect. And as it went into effect on the 1st day of January, 1870, it means those existing on that day. The absurdity cannot be imputed to the constitutional convention of intending to continue the county court without also continuing the judge thereof. And yet, if the term of office mentioned in that sentence is that which expired 31st December, 1869, the court would be continued, while, through the year 1870, there would be no judge of the court. For there is no provision in this article, nor in the Constitution of which it became a part, nor in the statute law, for such an emergency. It is true that there is provision for filling vacancies in offices, and for declaring when vacancies shall be deemed to have occurred, which declaration has been made. (§§ 9, 12, Judiciary article; Const. art. 10, §§ 5, 7, 8; 1 R. S., p. 122, § 34.) From these, however, it is to be seen that there is a distinction between a vacancy in an office, and the expiration of the term of office. The first is provided for, but the last can only be filled by election, at a general election, and the person elected enters upon the office on the 1st of January following. So that, on the construction contended for by the relator, the court is continued without a judge to perform its functions, for a time longer than could have been intended. If we extend our view to other sections of the article, we shall find still greater reason to conclude that, by the phrase "at the adop-

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Opinion of the Court, per FOLGER, J.

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tion of this article," was meant at the time when the article took effect. In section six, it is declared that "there shall be the existing Supreme Court, and it shall be composed of the justices now in office, who shall be continued during their respective terms." In section 12, "the Superior Court shall be composed of the six judges in office *at the adoption* of this article, \* \* \* the Court of Common Pleas of New York, of the three judges *then in office*, \* \* \* the Superior Court of Buffalo, of the judges *now in office*, \* \* \* and the City Court of Brooklyn, of, etc. \* \* \* The judges of said courts, in office *at the adoption of this article*, are continued until the expiration of their terms." In section 25, "surrogates, justices of the peace and local judicial officers, \* \* in office *when this article shall take effect*, shall hold their respective offices until the expiration of their terms." Now, in all these sections is evident one general purpose of continuing in existence and uninterrupted operation the courts named in them, and of continuing in office, until the expiration of their respective terms then current, the judges whom the article found in office. But the same phrases are not used to express that purpose. Some of those phrases are incompatible with any meaning as to time but the time when the article shall take effect. Such are, "now in office," "when this article shall take effect." And as all the phrases are used to indicate and effect the same purpose and result, they must all mean to point to the same time, that is, the 1st day of January, 1870. And with these other courts, as to the judges of whom the same phrase is used as is used as to county judges (*i. e.*, "in office at the adoption of this article") the construction urged by the relator would effect the same result of the court continuing, without its judges, or without a full complement of them.

It cannot be claimed, with any reason, that the intention of the framers of the proposed Constitution was to interrupt; it was rather to continue, without interruption, the powers and functions of the State, in all the co-ordinate branches of the government. We should not; from a too close adherence

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to the literal signification of words and phrases, impute to them that they meant that the judicial system, as a whole, should be in abeyance, or that any of its contemplated parts should be halting behind the others, for want of power to start abreast with them. The real intention, when ascertained, will always prevail over the literal sense of terms. And the reason and intention of the law-giver will control the strict letter of the law, when the latter would lead to palpable injustice, contradiction and absurdity. (1 Kent Com., 462.) The intention, without doubt, was to put in complete operation an entire system of judiciary, and to have all its parts in use at one and the same time. A construction which will, without being forced, easily and naturally carry out such intention, should be adopted; and such a construction is that which holds that the phrase, "at the adoption of this article," means at the time when the article took effect. It took effect on the first day of January, 1870; and, applying its force to the terms of office of the various judges which commenced on that day, at the same instant with the new article, we have a system every part of which went into full and harmonious operation at the same time. Such construction gives reasonable and concurrent effect to every phrase used in the article to indicate the judges and justices who shall, on the article taking effect, continue in office and compose the bench of the different courts named in it. The new article taking effect on the first day of January, 1870, and not sooner, could not affect a term of office which had expired on the day before. As it did affect, however, some term, it must be the term which began on the first day of January, 1870, *pari passu*, with the new article. *Eo instanti*, with the new article, began the term, and the instant there was an article to operate there was a term to be operated upon. It was the term beginning on the first day of January, 1870.

But another question is made by the relator. It appears that the defendant became seventy years of age on the ninth day of February, 1870. A sentence in the thirteenth section of the judiciary article says: "But no

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person shall hold the office of justice or judge of any court longer than until and including the last day of December next after he shall be seventy years of age." It is claimed that, if it be held that the defendant was continued in his office of county judge, after the 1st January, 1870, at all events he could not hold longer than including the last day of December of that year. The language of the sentence is very general and comprehensive. It will not do to limit the effect of it to only those justices and judges mentioned in the same section, for then it does not apply to judges of the Court of Appeals, who are equally as obnoxious to the reason of the provision. And yet, to apply it to the judges and justices whom the article found in office, and whom, by express provision, it continued in office until the expiration of the term upon which the article found them, would be to place a limit upon that provision and that term, which it is evident the article did not intend. I think that, if we consider what was the judicial system, when the convention took it up for amendment, in what way it proposed to amend it, and the possible ill effect of the proposed amendment, which it sought to guard against, we shall see that the several provisions, with the exact and full force of their language given to them, will be harmonious, and expressive of a consistent intention. The convention found a judicial system with a fixed, comparatively short term of office for the judges thereof, limited by the lapse of time, and, quite consistently therewith, no limit of age set up. This term it was proposed to lengthen to one nearly double, and the proposition was adopted. Then, as might have been expected, came in the apprehension that, during this long term, the natural decay of the powers of the man might at times leave upon the bench an inefficient judge. So as a safeguard against this, while as a general rule, fourteen years was made the term of office of the judges of the courts considered the more important, and six years of the county judges, as a particular provision, it was enacted that no person, holding any of these offices, should hold it longer than the end of the year in which he reached

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the age of seventy years. It is palpable that the intention of the convention was to place this limit of age upon the comparatively very extended term which they had adopted, and to guard against the possible evil which the lengthened term had alone suggested as possible. The short term of the old judiciary article raised no such apprehension, and presented no reason for the application of such a limit. This is apparent from a reference to the journal and debates of the convention, where it is shown that this limit of age was proposed and adopted while the lengthened term of judicial officers was alone under consideration. (Vol. 4, Proc. and Debates of Conv., p. 2665 *et seq.*, 2696 *et seq.* Journal, pp. 801 and 823.) The judges and justices found in office, with their terms then current, none of course exceeding, and but few reaching, the longest known to the system to be amended, might, notwithstanding all the force of reason which influenced the adoption of the limit of age for an office capable of the new and longer term, be left to serve out those shorter and accustomed terms. Accordingly, we find that the phraseology used for that purpose is just as broad, explicit and comprehensive as that which declares the limit of age, and moreover, it is not used in connection with anything which can give to it a color of intention that it should have other than its full and perfect force. It occurs where the whole purpose is to keep in being the existing courts and to provide them with the judicial force which was then conducting them. No suggestion of meaning occurs that any of that force should be dismissed or any portion of its term abridged. But the language is direct, unmistakable, and in itself, or by anything in its neighborhood, or by anything which of necessity applies to it, unqualified. "Shall hold their office until the expiration of their respective terms," it says: While on the other hand the prohibition, that no person shall hold the office of judge, or justice, longer than until seventy years of age, does in fact, as is shown by the debates and journal, grow out of the newly provided and extended term of office; is found in connection with that matter, and can, with just reason and fair



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deduction of what was the intention of the constitutional convention, be applied to and have its full operation if put alone upon persons entering on the extended term of office. As is aptly said by the learned justice who delivered the opinion at General Term: "By applying each provision to its proper subject-matter, with which it stands in connection, the whole apparent difficulty is at once solved, and each provision becomes consistent with the other, and all may stand and be carried out."

The convention did intend an instant and complete change in the organization of the court of last resort. That purpose is unmistakable, and the phraseology used is explicit. The convention did not intend an instant and complete change in the organization of the Supreme Court, and the courts inferior to it. That purpose is clear upon the record of the proceedings of the convention, from the report of the article by the judiciary committee, through all the debates and the various amendments to the article as reported, which were proposed and rejected, or proposed and adopted. The convention meant to continue in existence those courts. It meant also to continue in the conduct of them the judges, whom the article should find upon the bench of each. It meant that those judges should serve out their term, running when the article began its course, in accordance with the provisions of the Constitution under which they acquired the title to the office. It used language appropriate to effect such intention. Nor is there any necessary collision between that language and other in the article, when the object to which each is aimed is considered. Confining each to its appropriate object, each can have effect, and each purpose be accomplished.

We are of the opinion, that the defendant was legally elected to the office of county judge of Niagara county, and that he can lawfully hold the same for the term of four years from the 31st day of December, 1869. The judgment of the court below should be affirmed.

ALLEN, ANDREWS and RAPALLO, JJ., concur.

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CHURCH, Ch. J., and GROVER and PROKHAM, JJ., not voting.

Judgment affirmed.

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CHARLES P. CURRIE and others, Appellants, v. CUMBERLAND G. WHITE, Respondent.

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A contract for the purchase and sale of shares of the stock of a railroad corporation, at a specified price, "payable and deliverable, seller's option, in this year, with interest at the rate of six per cent per annum," effects a sale *in presenti*, the vendor becoming a quasi trustee for the purchaser, and the latter is entitled to all dividends accruing on such shares thereafter.

When the vendor gives notice, within the time, of his option to deliver, the rights of the parties become the same as though the time of delivery named by him had been specified in the original contract.

If the purchaser, pursuant to such notice, at the time named therein, offers and is ready to take and pay for the stock, and the vendor neglects to deliver or offer to deliver, a tender of the money is not necessary, as payment and delivery are to be simultaneous.

Assuming the power of the directors of a corporation to increase its capital stock, and to require the deposit or payment of money by subscribers to the new stock, such vendor is not bound to advance his own money for the purpose of preserving the right to the new shares which attached to the shares so sold. Unless the purchaser provides him with the means, he cannot claim that it is the fault of the vendor, that the stock purchased has not been increased.

If the purchaser makes distinct and separate demands, one for the shares purchased, with dividends accrued thereon, the other for the additional shares of new stock, he may recover the subject of the former demand, although not entitled to that of the latter. (ALLEN and FOLGER, JJ., *contra*.)

(Argued April 21st; decided September 5th, 1871.)

APPEAL from an order of the General Term of the Superior Court of the city of New York, affirming a judgment of the Special Term dismissing the complaint.

The plaintiffs and the defendant were stock brokers in the city of New York. Upon the 18th day of February, 1867,

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they entered into an agreement with each other, and executed as evidence thereof the following instruments:

NEW YORK, *18th Feb.*, 1867.

(1,000 shares.)

We have purchased of C. G. White one thousand (1,000) shares of the capital stock of the Hudson River R. R., at one hundred and twenty-eight per cent, payable and deliverable, sellers' option, in this year (1867), with interest at the rate of six per cent per annum; either party having the right to call, from time to time, for deposits, to meet the fluctuations of the market.

CURRIE, MARTIN & CO.

[10 Cent Stamp.]

NEW YORK, *Feb.* 18, 1867.

(1,000 shares.)

I have sold to Currie Martin & Co. one thousand shares of the capital stock of the Hudson River Railroad Company, at one hundred and twenty-eight per cent, payable and deliverable, sellers' option, in this year, with interest at the rate of six per cent per annum; either party having the right to call, from time to time, for deposits to meet the fluctuations of the market.

C. G. WHITE.

[10 Cent Stamp.]

On the 15th day of April, 1867, the Hudson River Railroad Company declared a cash dividend of four dollars per share upon the capital stock of said company, as it stood on the 18th day of February, 1867. And on the 15th day of October, 1867, declared another cash dividend of four dollars per share upon the same amount of capital stock.

These dividends were paid to the holders of stock on the 18th day of February, and on the 15th day of October, 1867, respectively.

On the 1st day of April, 1867, the board of directors of the Hudson River Railroad Company passed the following preamble and resolutions (among others):

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*Whereas*, The stockholders of the company, at a meeting of such stockholders, called by the directors of the company, in the manner required by law, and held at the office of the company, on the 30th day of March last, did, with the concurrence of more than two-thirds in amount of all its stockholders, authorize and sanction the increase of the capital stock of the company, to the amount of thirteen millions nine hundred and thirty-seven thousand and four hundred dollars; therefore,

*Resolved*, That the capital stock of the company be, and the same is hereby increased to the amount of thirteen millions nine hundred and thirty-seven thousand and four hundred dollars.

*Resolved*, That the stock transfer books of this company be closed on the 10th day of April inst., and that the persons or parties in whose names stock shall be standing on that day shall severally, on or before the 15th day of April inst., be entitled to subscribe, at the office of the company, No. 270 West Thirtieth street, in the city of New York, for an equal amount of additional stock; that the price of the additional stock shall be fifty dollars per share, payable as follows (specifying days and amounts):

That on the 15th day of October next, all installments being paid, full paid stock shall be issued.

*Resolved*, That where parties desire, for their own convenience, to anticipate payments, their money for any number of installments will be received, but no interest will in any case be allowed, nor will the stock be issued until the 15th day of October next.

*Resolved*, That stockholders failing to subscribe on or before the 15th day of April inst., or neglecting to pay their several installments as they severally become due, will lose all right to the additional stock, and will be deemed to have abandoned their subscriptions.

*Resolved*, That where parties desire to receive full stock on the 15th day of April inst., they may do so by paying fifty-

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four dollars per share at the time of making their subscriptions.

On the 8th day of April, 1867, the plaintiffs sent to the defendant a notice, of which the following is a copy :

NEW YORK, *April 8th*, 1867.

C. G. WHITE, Esq. :

*Dear Sir.*—On the 18th February last we purchased from you 1,000 shares of Hudson River Railroad Company stock, at 128 per cent, sellers' option this year. You will please take notice that we elect to subscribe for the additional stock, as provided in the resolutions of the company, at their meeting on the 1st April inst., and that we look to you for the same.

Very respectfully,  
CURRIE, MARTIN & CO.

But the notice was not received by the defendant until between four and five o'clock on the afternoon of the 10th day of April, 1867, when it was too late to become a stockholder on the books of the company or to subscribe for the additional stock. The plaintiffs never furnished the defendant with the means of subscribing for such additional stock. Upon the 18th of December, 1867, the defendant served upon the plaintiffs the following notice :

NEW YORK, *December 18*, 1867.

MESSERS. CURRIE, MARTIN & Co. :

I will deliver you to-morrow 1,000 shares Hudson railroad stock on my contract, February 18th, seller this year, at \$128 per share.

Respectfully,  
C. G. WHITE.

And upon the 19th he went with the 1,000 shares of stock to the plaintiffs' office and handed them the following computation of the purchase-price :

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| CURRIE, MARTIN & Co.:                    | <i>To C. G. White.</i> |
| February 18th, 1,000 Hudson, \$128 ..... | \$128,000 00           |
| 10 mo. and 1 day int., 6 per cent ..     | 6,421 33               |
|  | <hr/>                  |
|  | \$134,421 33           |
|  | <hr/>                  |

Certified check.

{ U. S. Stamp, }  
\$13.44.

The plaintiffs handed Mr. White the following notices, which they had already drawn:

NEW YORK, *December 19th*, 1867.

MR. C. G. WHITE:

We will accept the 1,000 shares Hudson railroad stock you propose to deliver to us to-day, and pay you therefor the sum stated in your account, \$134,421.33, and we demand of you the cash dividends thereon and interest.

Respectfully,

CURRIE, MARTIN & CO,

NEW YORK, *December 19th*, 1867.

MR. C. G. WHITE:

We require you to deliver to us, under your contract, dated 18th February, 1867, a second 1,000 shares of Hudson railroad stock, the portion of the new issue of stock by said company, on their increase of capital in April, 1867, accruing to the owner and holder of the 1,000 shares mentioned in your said contract. We tender to you the price at which said new stock was issued, with interest, \$56,232, and demand and claim from you the delivery of said 1,000 shares, and the cash dividends, if any, that have been made thereon.

Yours,

CURRIE, MARTIN & CO.

Whereupon White went away (without anything further being done) to consult counsel as to the legal effect of the notices, and nothing further transpired except the receipt of an additional notice, as follows:

## Statement of case.

MR. C. G. WHITE:

*Sir*.—Our checks for \$134,421.33 and \$56,232 have been ready for you since they were tendered you, with our two notices relative to our Hudson river contract, on the 19th inst. You then said you were not ready to give an answer, but would see about it. We are ready to do what we offered and tendered in our notices and renew our notices, but suppose your silence is equivalent to your refusal to comply with them.

Yours, etc.,

CURRIE, MARTIN & CO.

NEW YORK, December 31, 1867.

The case below is reported, 1 Sweeny, 166.

*William R. Martin*, for the appellants, cited *Couturier v. Hastie* (5 H. Lds. Cas., 673); 1 Pars. on Cont., pp. 102, 103; 2 Story on Cont., §§ 1023–1028); *Rensselaer Fac'y v. Reid* (5 Cow., 587); *Van Rensselaer v. Jewett* (2 Coms., 140); *Radway v. Briggs* (37 N. Y., 256); *Champernoun v. Brooke* (3 Cl. & Fin., 4); Sugd. V. & P., 806, 819; *Palmerston v. Turner* (33 Beav., 525); *Webster v. Donaldson* (34 id., 451); *Williams v. Glenton* (id., 528); *Regents Canal Co. v. Ware* (23 id., 575); *Stewart v. Lawson* (3 Sm. & Gif., 307); *Courtney v. Ferrers* (1 Sim., 137); *Terry v. Wheeler* (25 N. Y., 520); *Anson v. Toigood* (1 Jac. & W., 617); *Vesey v. Elwood* (3 Dr. & War., 74); *Kimbody v. Tew* (5 Irish R. Eq., 389); *Davy v. Barber* (2 Atkins., 490); *Ackland v. Gaisford* (2 Mad., 28); *Small v. Atwood* (3 You. & Coll., 105); *Mechanics' Banking Association v. Spring Valley Co.* (25 Barb., 419); *Nelson v. Eaton* (26 N. Y., 411); *Totterdell v. Fareham Co.* (1 L. R. C. P., 674); *Garste v. Lees* (3 H. & C., 558); *Bateman v. Porter* (15 Wend., 638); *Warren v. Mains* (7 John., 477); *Crist v. Armour* (34 Barb., 378); *Wallis v. Glynn* (19 Ves., 281); *Harding v. Davis* (2 Car. & P., 77); *Slingerland v. Morse* (8 John., 370); *Belinger v. Kitts* (6 Barb., 281); *Stone v. Sprague* (20 id., 514);

## Statement of case.

*Sears v. Conover* (34 id., 330); *Vanpell v. Woodward* (2 Sand. Ch., 145); *Dana v. Fidler* (1 E. D. Smith, 480); *Wheeler v. Garcia* (40 N. Y., 586).

*George C. Barrett*, for the respondent. The contract between the parties was executory and not executed. (1 Story on Com., §§ 18, 19; *Russell v. Nicoll*, 2 Wend., 112; *Outwater v. Dodge*, 7 Cow., 85; *Ward v. Shaw*, 7 Wend., 404; *McDonald v. Hewitt*, 15 John., 349; Story on Sales, §§ 231, 232, 296; *Boyd v. Siffkin*, 2 Camp., 326; 1 Par. on Con., 441, 442; 438, 439; *Goode v. Langley*, 7 Barn. & C., 26; 2 Kent., 468, note, 496; *Clarke v. Spence*, 4 Ad. & El., 448; Bell on Sales, 12; *Hanson v. Meyer*, 6 East, 614; *Simmons v. Swift*, 5 B. & C., 857; *Joyce v. Adams*, 4 Seld., 291; *Benedict v. Field*, 16 N. Y., 595, 597; *Baker v. Bourcicault*, 1 Daly, 24; *Russell v. Minor*, 22 Wend., 664, 671; *Chapman v. Lathrop*, 6 Cow., 110; *Decker v. Farniss*, 3 Duer, 316; 4 Kern., 615; *Kelly v. Upton*, 5 Duer, 336; *Lester v. Jewett*, 1 Kern., 454; *Levin v. Smith*, 1 Denio, 573; *Black v. Weble*, 20 Ohio, 304; *Stanton v. Small*, 3 Sandf., 230; *Turner v. Thornton*, 1 Com. Ben., 385.) Where the delivery of goods sold, and payment, are to be contemporaneous acts, the property, until such payment and delivery, remains in the seller. (*Bussey v. Barnett*, 9 M. & W., 312; *Bishop v. Skillits*, 2 B. & Ald., 329, n.; *Palmer v. Hand*, 13 John., 434; *Lupin v. Marie*, 6 Wend., 77; *Laidler v. Burlinson*, 2 M. & W., 602.) On the question of performance. (*Weld v. Hadley*, 1 N. Hamp., 295; *Des Arts v. Leggett*, 16 N. Y., 590.) On the question of tender. (*Roosevelt v. Bull's Head Bk.*, 45 Barb., 583; *Sanford v. Buckley*, 30 Conn., 344; *Wood v. Hitchcock*, 20 Wend., 47; *Breed v. Hurd*, 6 Pick., 356; *Kortright v. Cady*, 21 N. Y., 343; *Leatherdale v. Sweepstone*, 3 Car. & P., 342; *Simmons v. Wilmot*, 3 Esp. R., 91; *Heplum v. Auld*, 1 Cranch., 321; *Bateman v. Poole*, 15 Wend., 637; *Hornley v. Cramer*, 12 How., 490; *Strong v. Blake*, 46 Barb., 227.)



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Opinion of the Court, per RAPALLO, J.

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RAPALLO, J. By a stock contract such as this, the seller of shares deliverable at a future time assumes to have them, and to make a present sale of them, and to hold them for the benefit of the purchaser until delivery. The language of the contract imports a sale *in presenti*, and charges the purchaser with interest on the purchase-money, from the time of the sale to the time of delivery. If the seller, for speculative purposes, takes the chances of acquiring the shares in time for delivery, or if, having the shares at the time of sale, he deals with them till the time for delivery, he acts at his own risk. The purchaser cannot know whether the seller has the shares or not, nor do his rights depend upon that fact. They are the same as if the seller had the shares on hand, which he pretends to sell, and made a present sale of them, postponing simply the actual delivery, and keeping them on hand in the mean time. On this theory the purchaser pays interest on the purchase-money. He is, therefore, entitled to dividends accruing between the sale and the delivery. The plaintiff's right to these dividends seems to have been conceded by the defendant, at the interview of the 19th December. By the notice of December 18th, the defendant exercised his option as to the time of delivery, and appointed the 19th for that purpose. The time for delivery then became fixed, and the rights of the parties were the same as if the 19th of December had been appointed by the original contract for the delivery of the stock. On that day the plaintiff offered to the defendant, in writing, to take and pay for the 1,000 shares of original stock, and demanded the dividends thereon. The defendant's conduct in taking away this written offer and the stock, and not returning any answer to the offer, was equivalent to a refusal to perform. His previous statement, that he would deliver the stock and allow the dividends, was nullified by his subsequent conduct, in going away without offering the stock, and not returning any answer to the written proposition.

The plaintiff's offer, on the 19th, to take and pay for the original 1,000 shares, was absolute, and entirely separate from

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Opinion of the Court, per RAPALLO, J.

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his further demand for the 1,000 shares of additional stock. He did not make the delivery of the latter shares a condition of accepting and paying for the original shares. He evidently designed to perform as to the original shares, and still reserve his claim for the additional stock, but to keep the two subjects distinct and separate. It may be that he could not have accomplished this purpose, and that if he had accepted the original shares, with their dividends, he would have been barred from any further claim under the contract. He took his chances on that question, but made no reservation or condition which impaired the validity of his offer to perform as to the 1,000 original shares.

A tender of the money was not necessary; the payment and delivery were to be simultaneous. The offer and readiness to pay were sufficient, and by failing to respond to that offer the defendant dispensed with the necessity of a formal tender. The plaintiff showed that he was ready to pay, having made an arrangement with his bank to certify his check for the required amount on that day, and having prepared the check at the time of making the offer, for the precise amount of the statement furnished by defendant. If the defendant had said that he would deliver the stock on payment of the money, then it would have been necessary to tender it; but instead of that, he said he would go and consult his lawyer, and he went away, taking the stock with him, and did not return or send any answer. This constituted a refusal to perform.

I think the plaintiff was entitled to judgment for the difference between the contract price and interest and the market value of the 1,000 shares of stock on the 19th of December, with the two dividends thereon. As to the claim for the additional stock, I concur in the conclusions of my learned brother FOLGER.

I think the judgment should be reversed and a new trial ordered, unless the defendant shall consent to a judgment for the proper amount to cover the claim for the non-delivery of the original 1,000 shares and cash dividends.

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Dissenting opinion, per Folger, J.

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FOLGER, J. (dissenting.) The contract between the parties is an agreement for the sale of shares of stock, the shares to be delivered in the future, and the purchase-price then to be paid with interest. This contract was executory. (*Kelley v. Upton*, 5 Duer, 336.) But by virtue of it the vendor became a trustee, *sub modo*, of the shares, for the vendees, and they became the *cestuis que trust, sub modo*, thereof. (Hill on Trustees, 259, 170, 171.) The rigid letter of the contract might perhaps be met by a delivery of 1,000 shares of capital stock, however changed in their proportion to the whole number issued by the company, from the time of the contract to the time of the delivery. But the parties meant more than this by their contract. The one meant to buy and the other agreed to deliver these shares, with all the rights which attached to them at the time of making the contract. One of these rights was to take new shares, upon any legitimate increase of the capital stock, which right attaches to the old shares, not as profit or income, but as inherent in the shares in their very creation. (*Atkins v. Albree*, 12 Allen, 359; *Brander v. Brander*, 4 Ves., 800, and notes, Sumner ed.)

When, on the 19th December, 1867, the defendant was ready to deliver the 1,000 shares, this right had been severed from them; it had been exercised and no longer attached, and could not be transferred with the shares to the plaintiffs. There had been but one mode of retaining or exercising it to the advantage of the shares. That was by subscribing for the new stock. But to do this required a deposit (we will allude but to one mode of making payment) of fifty dollars per share. This requirement was made by the directors of the company. We will for the present assume that they had the power to do this and the acts accompanying it; for, if they had not, then the issue of new stock is illegal, and there is no question upon this part of the case between the parties. Upon whom did the requirement place the burden of advancing the money for this payment or deposit?

It is held (*Faulkner v. Hebard*, 26 Vt., 452) that the vendee of stock in a corporation is bound to know what the

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Dissenting opinion, per ALLEN, J.

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Unless as trustee, *sub modo*, the defendant was bound to advance the money to make effectual a subscription for the increased stock, then the plaintiffs required more of him than they were entitled to, and making his compliance with their demand the condition of performance of the contract by them, their right of action has not accrued. I hold, that the duty of defendant as trustee was fulfilled by preserving the subject of the trust in the condition in which it came into his hands, by receiving and accounting for all the profits which accrued from its ordinary use, but that he was not bound, with or without notice from the plaintiffs, to make advances from his own funds to add to the value of the subject, or to change its condition, or to avail of the benefit to it to be derived from the acts of others, of which payment of money was a condition. And in whatever aspect of the case it is viewed, this consideration is controlling. In no event, properly resulting from this contract, was this defendant bound to advance the money, to fulfill the condition on which a subscription for the increase of stock could be made. And as no offer of performance was ever made by the plaintiffs, which did not require the defendant to act as if he were so liable, and as an offer to perform on their part was needful to put the defendant in default, they have made no offer of performance which has made the defendant liable to them in this action. As this one position is decisive of this appeal, I do not present views on other important questions made in the case.

The judgments of the courts below should be affirmed, with costs to the respondent.

ALLEN, J. (dissenting.) The undertakings of the respective parties to the contract were dependent, and the acts they were bound to perform were concurrent and reciprocal. (*Bank of Columbia v. Hagner*, 1 Peters, 455; *Dana v. King*, 2 Pick., 156; *Johnson v. Wygant*, 11 W. R., 48.) The plaintiffs could not call upon the defendant to deliver the stock except upon payment of the agreed price, neither could

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Dissenting opinion, per ALLEN, J.

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the defendant claim the money except upon a transfer and delivery of the stock. The acts of the parties in the performance of the contract were to be simultaneous, the agreement not contemplating a credit to either. Neither could put the other in default, except by performance or a tender of performance on his part, and a recovery cannot be had for non-performance of the contract, unless an actual performance or tender of performance is averred and proved by the party alleging a breach by the other. (Cases cited above; *Lester v. Jewett*, 1 Ker., 453; *Jones v. Marsh*, 22 Vermont, 144.) It was not claimed that there was actual payment, or any tender of money. The only offer was of the checks of the plaintiffs. The check for the 1,000 shares named in the contract at the agreed price was for \$134,421.33, and the other check offered was for \$56,232, amounting in the aggregate to \$190,654.33. It was admitted on the trial that, on the 19th day of December, the plaintiffs had not in any bank or banks money standing to their credit sufficient to meet the checks they had drawn, and that, on the 31st of December, they had not funds in any bank or banks standing to their credit to meet the checks offered to the defendant, and that they had not, on either of the days named, a sum exceeding \$50,000 standing to their credit in any bank or banks in the city. Aside from every question of tender, the plaintiffs were not ready or in a condition to perform the contract on their part. These checks did not represent, and were not drawn against moneys on deposit. The smallest of the checks was not good as representing funds against which it was drawn. All the cases agree that a readiness, as well as an offer, to perform, must be shown by the party seeking to put the other in default.

The readiness to perform a contract calling for the payment of money, recognized by law, is the actual possession of or control of the money, as owner or with the right of disposal for that particular purpose. (*Hammond v. Gilmore*, 14 Conn., 479.) Ability and readiness to pay was a fact material to be proved by the plaintiff upon the trial. SPENCER, J., in *Porter*

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Dissenting opinion, per ALLEN, J.

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v. *Rose* (12 J. R., 209), says: "Where two acts are to be done at the same time, as where one agrees to sell and deliver, and the other agrees to receive and pay, an averment by the purchaser, in case he sues for the non-delivery, of a readiness and willingness to pay is indispensably necessary; and consequently the readiness and willingness to pay is matter to be proved on his part, whether the other party was at the place, ready to deliver the thing contracted for, or not." The case cited was disposed of upon the application of this doctrine.

To the same effect is *Topping v. Root* (5 Cow., 404), and the principle has never been questioned. (See *Bronson v. Wiman*, 4 Seld., 182; *Lester v. Jewett*, *supra*.) There was no evidence that the checks would have been paid. There was no proof, or offer to prove such fact; neither was there any request to the referee to find that the checks were the equivalent of money, or would have been paid on presentation. It will not be assumed that checks drawn without funds to meet them will be paid. On the contrary, the presumption is in accordance with the law that, as checks available for obtaining money, they are worthless, whatever their value as the obligations of responsible persons may be. The bank was under no obligation to honor them, and the presumption is they would have been dishonored. But it is enough that there was not, at the time of the offer, a readiness and an actual ability to take and pay for the stock shown. This is essential, aside from every question as to the form and efficiency of the tender. The plaintiffs did not have the money during either of the days referred to.

The plaintiffs recognized the necessity of proving a readiness and ability to pay by the evidence they gave in respect to the certification of the checks. The evidence is not satisfactory for the purpose for which it was given, as it comes far short of proving that, on the 31st of December, the bank would, without funds, have come under an obligation for near \$200,000, and there was an entire absence of evidence that any officer of the bank had authority to certify checks as good when the drawer was not in funds. There was not even evi-

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Dissenting opinion, per ALLEN, J.

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dence that, in the course of business in that bank, the president was in the practice of certifying checks, or transacting other business usually performed by cashiers, or that circumstances existed which would have estopped the bank from denying the authority of the president, and repudiating the certificate, so as to make the check valid as an obligation of the bank in the hands of the defendant. An authority to pay a check without funds of the drawer, or to certify it as good when there are no funds to meet it, will not be presumed, and a certification under such circumstances only binds the bank by way of estoppel, and to prevent a fraud upon innocent holders. It is not intended to impute fraud or a fraudulent intent to the plaintiffs in procuring these checks to be certified, although without funds at the time to meet them, as they might have been reasonably certain of being able to make provision for their payment before, in the course of business and transmission through other banks, they could be presented; but the confident expectation or reasonable certainty of an ability to provide in the future, is not the equivalent of a present readiness and ability to pay. A certification of a check, without funds on deposit, is irregular, and it may be questionable whether a party might not properly refuse to receive a check thus certified, upon the principle of *Reed v. Bank of Newburgh* (6 Paige, 337). But a certified check is not money, or if funds are not on deposit to meet it, the representative or equivalent of money. It is but an obligation of the bank to pay, or rather to make good its representation. If the defendant should consent to receive it in payment, he might do so, but he was not bound to receive it, and, therefore, the ability to procure, or even the possession of a certified check, it being admitted that the drawer had no funds, or not sufficient funds to meet it, would not be evidence of the plaintiff's ability to pay the money. On the contrary, it would be evidence of his inability; and a possession of the check, thus certified, would simply be evidence of the ability of the plaintiffs to induce the bank to become security for the payment of the debt, for this is the legal effect of the trans-

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Dissenting opinion, per ALLEN, J.

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action. Again, as before suggested, a certification of a check is only an admission of a fact, to wit, that the drawer is in funds, applicable to its payment, and, if untrue, may be contradicted, and binds no one except in favor of one who has acted and parted with value on the faith of it. Had the defendant received the check with knowledge of the truth, the certificate would have added nothing to the value of the check, and a paper that only has value from a concealment of the truth is valueless, and for all purposes the checks, certified or uncertified, should be treated according to the value they intrinsically had, under the circumstances as they actually existed, assuming as we must, that no factitious value would be given to them by withholding the truth. The defendant's ability to enforce a check, certified without funds, against the bank, would depend upon the evidence of his knowledge, and it is but equity that he should have the benefit of the truth in resisting any claim founded upon an untruth. If it be conceded that he made no objection to receive a check, and waived the right to demand lawful money, yet he did not, by such act, waive the right to demand a check good as drawn against an actual deposit. A party giving a check, in effect, represents that he has money on deposit to meet it. He did not receive it; and when the plaintiffs sue for a breach of the contract, this assent to the form of payment, by check, does not dispense with proof that the check was good, and that the plaintiffs were then able and ready to pay the money, either upon the check or the original contract. But the evidence of ability to pay, even by a check certified by the officers of the bank, is insufficient and unsatisfactory. The fact was not proven so conclusively that it was error not to find the fact. The evidence was slight, but perhaps sufficient to raise a question of fact for the jury or other tribunal having the trial of issues of fact. It is true, one of the plaintiffs and one of the clerks say the checks would have been certified on the 31st of December, but, so far as the case discloses, this is based entirely on an interview between the same plaintiff and the president



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Dissenting opinion, per ALLEN, J.

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of the Tenth National Bank, on the 18th of December, when it was expected the transaction might be concluded the next day. The evidence is that, on being told by this plaintiff that he should probably want to draw these amounts the day following, and that it would be an unusual overdraft, the president told him he would certify the checks. He never applied before to the president to certify checks, and there is no evidence that the president ever certified a check for any person. This promise, if authorized, bound no one, and the plaintiffs gave no evidence that the president remained of the same mind on the 31st of December, nearly two weeks thereafter, and the checks never have been certified. A jury, or the referee, might well have found that the allegation, that the checks would have been certified, was not proven. The plaintiffs did not prove that they were able and willing to take and pay for the stock on the 31st of December, and for that reason the complaint should have been dismissed. But, secondly, there was no sufficient tender and offer of performance to put the defendant in default. It is agreed that the plaintiffs were in no condition to demand, and had no legal right to claim the additional stock, created and issued under the action of the directors of the railroad corporation in April, 1867. Leaving out of view the dividend on the shares which the plaintiffs claim, under their contract, they were entitled to the delivery of 1,000 shares of the stock of the Hudson River Railroad Company, on the payment of \$134,421.33, and this was the extent of their legal right. In considering the sufficiency of the tender, it should be remembered that the parties were dealing at arms' length, neither making concessions or waiving any claim, but each standing on their strict legal rights. The plaintiff, Martin, says he did not think the defendant would accept the checks; and the formal manner in which the plaintiffs approached and communicated with the defendant, together with the wary and cautious bearing of the latter on each occasion, making no answer to any claim made upon him further than that he did not understand the effect of the propositions, and would see,

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Dissenting opinion, per ALLEN, J.

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or that he would see his lawyer, in connection with the fact that the contract, as interpreted and insisted upon by the plaintiffs, if performed, would involve the defendant in a heavy loss, negative all idea that the defendant intended to waive any, the most strict and technical, legal right, or that the plaintiffs understood him as waiving or conceding anything. The general rule is, that, to make a legal tender, there must either be an actual offer of the money produced, or the production of the money must be dispensed with by the express declaration or an equivalent act of the creditor. (*Thomas v. Evans*, 10 East, 101; *Bakeman v. Pooler*, 15 Wend., 637.) If anything but money is offered, the tender will not be effectual for any purpose, unless the creditor in terms, or by clear implication by some act equivalent to an express declaration, waives all objections to the quality or character of the tender. Perhaps an objection to receive the tender upon another distinct and specific ground would be regarded as evidence of a waiver of an objection to the quality of the tender; upon two grounds: 1. The statement of one objection may be regarded as evidence of an intent to waive all others, on the principle of *expressio unius est exclusio alterius*. 2. A statement of one objection which cannot be obviated, and a silence as to an objection which can be obviated, will operate to mislead the debtor, unless the creditor is held to the objection taken. By taking one objection, he induces the debtor to act upon the belief that there are no others, or that all others which could be taken are waived. (*Carman v. Pultz*, 21 N. Y., 547; *Haskell v. Brewer*, 2 Fairf., 258.)

The cases in which the creditor has been held to have waived, by implication, the objection to the quality of the tender, and dispensed with a tender of money, are those in which the debtor has refused to receive the tender on the express ground that the amount was insufficient. (*Polglass v. Oliver*, 2 Cr. & Jr., 15; and cases cited in note to Am. ed.) The mere passive refusal to receive a tender, or rejection of it without assigning a reason waives nothing, and leaves the party to

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Dissenting opinion, per ALLEN, J.

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justify his refusal upon any ground recognized by the law. In *Dunham v. Jackson* (6 W. R., 22), in the Court for the Correction of Errors, the rules relating to a tender upon money contracts were carefully considered, and Judge MARCY, in the only opinion delivered, and which was concurred in by the whole court, protests against any relaxation of the rules upon that subject which will render it a matter of uncertainty what shall constitute a tender. He says, in such an event, "nothing will have been gained." "Rigid rules are, upon the whole, better than uncertain ones," and cites, with approval, *Thomas v. Evans* (10 East, 101), and *Kraus v. Arnold* (7 J. B. Moore, 59).

*Dunham v. Jackson* was a bill to redeem stock from a pledgee, and the parties had come together for the purpose of redeeming. A broker attended to receive a reassignment of the stock and pay what should be found due the pledgee, and, after the amount was agreed upon, being requested by the agent of the pledgee to draw his check for the amount, took out of his pocket-book a blank check for the purpose of filling it up, but was interrupted by the pledgee observing "let it be done to-morrow," and demanding a larger sum than the amount liquidated; and it was held that these circumstances did not amount to a tender, and that the bare refusal to receive the sum due and the demand of a larger sum, were not enough to excuse the actual tender of the money. Chancellor KENT's decree, holding the tender and offer insufficient, was unanimously affirmed. In *Thomas v. Evans* (*supra*), the defendant had left £10 with his clerk for the plaintiff, of which the clerk informed the plaintiff when he called and demanded a larger sum, and the plaintiff said he would not receive the £10 or anything less than his whole demand; and it was held that this did not dispense with the actual production and offer of the money. In *Kraus v. Arnold* (*supra*), the agent of the debtor offered to pay to the clerk of the debtor's attorney £7 12s., saying that one Tenson had the money for that purpose, but the clerk demanded £8. Tenson was present, and put his hand in his pocket to take out his

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Dissenting opinion, per ALLEN, J.

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pocket-book to pay the £7 12s., but the agent of the defendant desired him not to do so, as £8 were demanded. The court held there had been no legal tender, and that the money should have been produced, "when, perhaps, the clerk might have been tempted to take it." Within the cases cited there was no legal tender or offer to perform the contract by the plaintiffs. There was no production or offer of money, and there was no act or declaration of the defendant dispensing with its production, and consenting that the checks tendered should for any purpose be regarded as money. He did not waive the objection to the quality of the tender. Very possibly, had bank notes, which are a part of the currency of the country and pass as money, been offered, and not specially objected to, the tender might have been sufficient in that respect; but it is not necessary to consider that question, as no money was present or offered, and the cases recognize a broad distinction between bank notes of the character mentioned, and bills of exchange, checks and other instruments, which are mere securities or documents for debts. (*Miller v. Race*, 1 Bur., 457; *Bank of the U. S. v. Bank of Georgia*, 10 Wheat., 333, per STORY, J.; *Wright v. Reed*, 3 T. R., 554; *Snow v. Perry*, 9 Pick., 539.) The plaintiffs did not in any form offer or propose to pay the money. On the contrary, they limited their offer to the checks, only proposing, and that equivocally, in case the checks were objected to, to get them certified. By thus restricting their proposal, they indicated very clearly not only the extent of their ability, but the limit of their intentions, and their action was equivalent to an express declaration that they would do nothing more than deliver the checks. It would seem that the proposition was to get the checks certified after the delivery of the stock. The clerk swears that he told defendant that he would get the checks certified if he required it; that defendant made no reply, and he added, "if he would transfer the stock." The defendant was not required to state his objections to the proposal, and he did not. He avoided a direct answer and left the plaintiffs, without saying or doing anything to mislead them, to

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Dissenting opinion, per ALLEN, J.

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take such action as the law prescribed, if they desired to lay the foundation of an action by putting him in default. (*Bakeman v. Pooler, supra.*) The defendant did not give the stock for the checks; he did not refuse to perform the contract or to do any act, save only to exchange the stock for the checks. *Non constat*, that, upon the production and offer of the money, he would have transferred and delivered the 1,000 shares agreed to be sold. He did not say he would not. There is still another objection to the tender, fatal to it as the foundation of an action against the defendant. The offer to receive and pay the agreed price for the 1,000 shares was not an unqualified, unconditional offer.

The remarks of Judge COWEN, in *Wood v. Hitchcock* (20 W. R., 47), are appropriate to this case. He says: "The books are sufficiently nice as to the manner of a tender, but I think the case at bar shows that they are not so without reason. The person making the tender may avoid all implication against the idea of a qualification, or other circumstance destroying his tender, by making it in writing, and even negating that it is on any condition or reserve, or intended to prejudice the plaintiff's further claim." If the acts of the person making the tender are ambiguous or of doubtful import it is his fault, and they are to be construed most strongly against himself. It is well settled by authority that a tender must be unconditional; that no condition must be annexed to it which the creditor can have any good reason for objecting to. There must not be anything raising the implication that the party making the tender intends to demand, as a condition of the tender, anything to which he is not entitled. (*Wood v. Hitchcock, supra*; *Brooklyn Bank v. De Grauw*, 23 W. R., 342.) He may not require as a condition a receipt or an indorsement of the payment upon an obligation. (*Eddy v. O'Hara*, 14 W. R., 221; *Thayer v. Brackett*, 12 Mass., 450; *Loring v. Cooke*, 3 Pick., 48; *Richardson v. Boston Chemical Laboratory*, 9 Met., 42.)

The referee has found as a fact, that there was no offer by the plaintiffs to take and pay for the 1,000 shares, dis-

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Dissenting opinion, per ALLEN, J.

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tinct and independent of a demand for another 1,000 shares and for two dividends on 2,000 shares; in other words, that the offer was conditional and connected with a demand, to which the defendant had a right to object. If there was any evidence in support of this finding, it is conclusive in this court, and cannot be reviewed. Whenever there is ambiguity or question as to the intent of the party making a tender, growing out of his acts and declarations and the circumstances attending the transaction, the question whether the tender is conditional or unconditional is one of fact for the jury, and not of law for the court. Where the debtor's agent told the creditor he had called to tender £8 in settlement of his account, and the creditor answered that he would take nothing less than the bill for £19, which the debtor's agent produced at the time, it was held that it was a question for the jury whether the tender was conditional or unconditional. Lord DENMAN, Ch. J., said "there was enough of ambiguity to make the matter fit for a jury;" and to the same effect is *Marsden v. Goode* (2 C. & K., 133), in which the question was whether a check was tendered in full payment of all claims and unconditionally. Here was enough of ambiguity to carry the case to a jury, and in such case the finding of the referee concludes this court. The evidence not only supports the views of the referee, but a report that the tender and offer were unconditional would have been against evidence. The interview of the 19th of December may be referred to as throwing light upon and aiding in the right understanding of the transaction of the 31st December. It is true that no tender of performance was then made by either party, so as to put the other party in default. (*Dunham v. Jackson*, *supra*; *Leatherdale v. Sweepstone*, 3 C. & P., 342.) But the acts of the plaintiffs indicate very clearly their views of their rights under the contract, and the purpose and object of their subsequent offer. Upon that occasion, when the defendant offered to transfer the 1,000 shares on receipt of the agreed price, he consented, on the suggestion of the plaintiffs, to take off the cash dividends,

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Dissenting opinion, per ALLEN, J.

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if the plaintiffs would indorse his certificates in the trust company, which would have enabled him to withdraw his deposits. This would have closed the contract, giving the plaintiffs all they claimed in respect to the original shares contended for. This they virtually declined, and immediately delivered to the defendant the two papers making distinct demands, one for the original 1,000 shares and the cash dividends thereon, and the other for 1,000 shares additional stock. They were handed simultaneously, and as demands then due upon a single contract. The one only claimed as incidental to and dependent upon their right to the other, and having no foundation except upon the obligation to transfer the original shares. The demand was necessarily single, and in whatever form presented, its nature was not changed. The obligation of the defendant to transfer stock, whatever its extent, was a single obligation, not capable of being severed by the act of the plaintiffs, and they did not undertake to sever it. The fact that separate checks were proposed, and were subsequently offered for the two amounts, did not vary the effect of the transaction, as a single offer, and a single demand upon the defendant to fulfill his obligation as interpreted by the plaintiffs. The transaction of the 31st of December was in harmony with this view. On that day the two checks were offered at the same time, as a performance of the one contract, by the plaintiffs, and one letter was handed to the defendant as the demand, the condition upon, and purpose for which the checks were offered. In that note the plaintiffs say: "We are ready to do what we offered and tendered in our notices and renew our notices." They renew them in a single breath and the offer was of the two sums together, and the demand upon the defendant was single, although of two distinct thousand shares, and as if in words the plaintiffs had said to the defendant, "we offer you two checks, one for \$134,421.33, and the other for \$56,232, the one being the contract price for 1,000 shares of Hudson River railroad stock, and the other the cost, and interest on the cost, of an additional 1,000 shares, to which

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Statement of case.

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we are entitled under our contract, and in payment for these 2,000 shares, and which we now require you to deliver to us under your contract." It is very certain that the plaintiffs did not indicate that the defendant was at liberty to accept one check, and transfer one part of the stock demanded, and refuse the other, and such was not the legal effect of the offer. Had the plaintiffs transmitted the checks by mail, with the letter of 31st of December, the defendant would have been bound to accept both, and perform the entire demand; accept the proposition as made, or reject it. He could not legally have separated it, and acceded to one part of the proposition and retained one of the checks, and repudiated the residue. The plaintiffs might well have said, "we made you no such offer as you have assumed to accept." Upon the evidence the tender was conditional and therefore void.\*

For these reasons, as well as those assigned by Judge FOLGER, I am for an affirmance of the judgment, with costs.

CHURCH, Ch. J., GROVER, ANDREWS and PECKHAM, JJ., concur with RAPALLO, J. ALLEN and FOLGER, JJ., for affirmance.

Judgment reversed and new trial granted, unless the defendant consents to a judgment against him for \$1,453.67.

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CAVIE RICHARDSON, Respondent, v. THE NEW YORK CENTRAL  
RAILROAD COMPANY, Appellant.

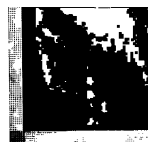
Where the defendant's railroad is carried across a public highway in such manner and place that those traveling the highway can neither see nor distinctly hear approaching trains until too late to avoid collision with them, the company is liable for such collision in the absence of negligence of those injured.

Compliance with the statute as to sounding the whistle and ringing the

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\*NOTE.—The right of the directors to increase the capital stock was not passed upon by the court. (REP.)





against the dangers to which they were exposed in passing the crossing, which were proper and necessary.

*Geo. G. Munger*, for appellant, relied on *Grippin v. N. Y. Cent. R. R.*, MS., Ct. of Appeals, Nov., 1870; and *Beisiegel v. N. Y. Central R. R. Co.* (40 N. Y., 9).

*W. C. Rowley*, for respondent, cited *Bradley v. B. and M. R. R.* (2 Cush., 540); *Kinney v. Crocker* (18 Wis., 74). The care to guard against the danger to others must be in proportion to the danger. (*Kelsey v. Barney*, 12 N. Y., 429; *Johnson v. H. R. R. Co.*, 6 Duer, 633; *Bowen v. N. Y. C. R. R. Co.*, 11 N. Y., 408; *Brown v. N. Y. C. R. R. Co.*, 34 N. Y., 404.) See, also, *Cook v. N. Y. C. R. R. Co.* (3 Keyes, 476, 479).

PECKHAM, J. The statute allows railroads to cross public highways, but requires the railway company "to restore the highway thus intersected to its former state, or to such state as not unnecessarily to have impaired its usefulness." (3 N. Y. S. at Large, Edm. ed., 628, § 28, sub. 5.) Another provision authorizes such companies, in crossing a highway, to go under or above it, as may be expedient. (*Id.*, 626, § 24.) Did the legislature intend by these provisions to allow a railway company to shut up a highway and deprive the people of its entire use? That would seem to be the effect of reversing this judgment, as a road is substantially closed to the public, which cannot be traveled by the cautious without *imminent* peril to their lives.

The injury in this case occurred to the plaintiff, notwithstanding the exercise of every care by him, as such is the finding, and it is well sustained by the proof.

When he arrived at a proper distance from the crossing, for that purpose, he stopped his horses, rose up in his wagon, looked and listened, and neither saw nor heard aught of the train. Then proceeding again carefully, he sustained the injury by a train rushing suddenly against his horses and

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Opinion of the Court, per PECKHAM, J.

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wagon, etc., which it was impossible for him to avoid after he saw it.

The deep cutting in which the rail-track ran, the watch-house erected, but not used by the defendant, prevented the train from being seen until the traveler approached within a few feet of the crossing. The watch-house obstructed the view a distance further off. The sound of a fall of water at the crossing, besides the peculiarity of the road, prevented the noise of the train, whistle or bell from being heard; and the cars were running at the rate of about thirty-six miles an hour.

The highway was not closed in fact or in law. The public had a right to use it for travel. The plaintiff, at the time of the injury, was exercising a clear right upon that highway.

The grade of the highway was necessarily considerably changed by reason of this crossing.

All peril of this kind could have been avoided by the railway, by going under or above the surface of the highway at the crossing. If this danger could be avoided in no other way, then it would seem to follow that the "usefulness" of the highway was "unnecessarily impaired" by the railway's omission to do either. It had failed in its statute obligation. It was not the duty of the highway, but of the railroad, to give this protection from the peril caused by the railroad.

Again, in laying down rules of general application, courts find it frequently necessary to make exceptions, to prevent injustice.

When the reason of the rule fails, the law usually discharges the rule. For the protection of the traveling public, the statute requires railroads to ring their bells or sound their whistles a certain distance from the crossing over a highway. The legislature required this, in order to give notice to the traveler of the approaching peril, and to enable him to avoid it. Almost universally, this is a sufficient protection. But, in the case at bar, it gave no notice whatever, and gave no protection. This the defendant well knew, and could not avoid knowing from the surroundings. It also knew that the

legislature intended that the traveling public at such places should have notice of the approach of a train in some manner. In this case, as it failed, knowingly failed, to give any notice, it was guilty of a neglect, for which it was justly held liable. Upon that ground it is, in my judgment, liable upon the soundest principle.

The legislature has never enacted that a railroad shall not be liable for any injury at a crossing where it rings its bell or sounds its whistle. No legislative impunity is given to the railroads for damages they may wrongfully cause. But the statute declares that they shall do those specified things, and that they shall be liable for any damages caused by their omission. As a general rule, undoubtedly, they are exempt from liability to the outside public when, in good faith, those provisions are substantially complied with. But there may be cases where the purpose of these requirements is not and cannot be attained by their technical fulfillment. Such is the case at bar—plain and palpable; easily understood, as the act of the company in building the watch-house and in keeping a watchman there for some time, shows the defendant understood it.

This principle has been substantially held by this court in the last decision in *Beisiegel v. This Defendant*.

The defendant again, by its own act, caused this injury, in its erection of the watch-house, now not used, but preventing the traveler from seeing the train, which he otherwise might.

That it obstructed this traveler's view, is found by the referee. That it thus caused the injury, may be fairly inferred, as nothing could be seen as he approached the track "owing to the formation of the ground and the situation of the watch-house."

There was a map at the trial in evidence and none is produced here. Presumptions are in favor of affirming a judgment. Error is not presumed. If there were doubts on this point, in the absence of the map, the presumption is against error.

Opinion of the Court, per PECKHAM, J.

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A building thus erected by a railroad, which prevented the public from seeing a train until too near for safety, has been held by this court a good ground for recovery. (*Mackay v. N. Y. Cen. R. R. Co.*, 35 N. Y., 75.) It is so in this case.

GROVER, J., was for affirmance, on the ground that the rate of speed of the cars was improper, at that point.

FOLGER and ANDREWS, JJ., concur, on the ground that the defendant, by erecting the watch-house, had obstructed the view.

RAPALLO, J., concurs, on the ground that, the road being so constructed that the view was obstructed, defendant was bound to take proper measures, on its own premises, to protect travelers on the highway.



# INDEX.

## ACCORD AND SATISFACTION.

See ATTORNEY AND CLIENT, 5.

## ACKNOWLEDGMENT.

1. A certificate of acknowledgment, taken in 1828, stating that the persons acknowledging were known to the officer "to be the persons who executed" the deed, was a substantial compliance with the statute. *West Point Iron Company v. Reymert.* 703

## ACTION.

1. The plaintiffs were first and second and the defendant third indorsers upon two drafts and a note of one N., who held a contract for the purchase of lands. N., being insolvent, transferred the contract to the defendant, absolutely in form, but in fact as security for the latter's liabilities on N.'s account, including the drafts and notes. On the same day he made a general assignment to the plaintiffs, in trust for creditors, preferring the drafts and note. Shortly after this, the plaintiffs gave to the holder of the drafts and note, for the aggregate amount thereof, a note made by one of them, indorsed by the other as first indorser, and by the defendant as second indorser. The holder, a bank, thereupon gave up to them the drafts and note, with the bank mark of cancellation upon them. One of the plaintiffs, under the suggestion of the defendant,

then brought action against the acceptor of the drafts, but failed from defect of parties. The new note was renewed, from time to time, and finally paid by the defendant. About the same time, the defendant paid up the amount due upon N.'s land contract, and took a deed of the premises. Immediately after paying the note, he brought suit against the plaintiffs to recover back the moneys so paid, and after litigation (in which the plaintiffs defended on the ground that the defendant had received N.'s contract and deed as security for the original drafts and note, and that the value of such security exceeded the amount paid by him, which defence was denied, in all particulars, by the defendant), recovered judgment against them for the whole amount, which judgment they paid. The plaintiffs then brought this action, asking either to be permitted to redeem the contract as assignees of N., or to be subrogated as sureties to the defendant's rights in the contract, to the extent of their payments.—*Held*, this action having been commenced more than ten years after the assignment, and after the giving of the new note by the plaintiffs, with defendant as indorser, but within ten years after the payment by the plaintiffs of the defendant's judgment against them, that the right to redeem was barred, but the right to subrogation not having accrued until the payment of the judgment, was not barred by the statute of limitations.—*Held*, further, that the defendant's judgment was no bar to this action to enforce such right of subrogation. *Bennett v. Cook.* 268

2. The statute (ch. 248, § 29 of 1857), giving to the commissioners of pilots a penalty of \$100 against any "person employing a person to act as pilot not holding a license," does not authorize the recovery of but one penalty against a party who has employed an unlicensed pilot, although such employment was repeated for numerous ships. *Sturgis v. Spofford*. 446.
  3. There is no rule forbidding one partner to sue another at law in respect of a debt arising out of a partnership transaction, if the obligation or contract, though relating to the partnership business, is separate and distinct from all other matters in question between the partners, and can be determined without going into the partnership accounts. *Crater v. Bining*. 545
  4. The defendant purchased from the plaintiff an engine, boilers and other machinery. The engine and boilers were agreed by the plaintiff to be of the best material and workmanship and in perfect running order. No time was specified for their delivery, but they were to be approved by the defendants' engineer. The boilers, after delivery, were found defective; one of them collapsed at the first trial, and was rendered useless. The defects in the boilers were subsequently supplied by the plaintiff, with the consent of the defendant, and were then accepted by the defendant and approved by his engineer.—*Held*, that the original failure of the boilers was not, after their final acceptance, any defence in an action for the price. Such acceptance, however, was no waiver of a right of action for the damages occasioned by the explosion and loss of use of machinery, and those damages might have been recouped in an action for the price by proper averments in the answer. *Cassidy v. Le Fevre*. 562
  5. An obligation was obtained from the plaintiff by fraudulent representations. A and B both claimed to own it by assignment. Each commenced an action against him, and claimed in hostility to each other.—*Held*, that he might, during the pendency of the actions against him, bring a separate suit against both claimants, to be relieved from the contract, on the ground of fraud therein, and was entitled to the decree of the court against them ordering its surrender and cancellation, upon establishing the fraud. *McHenry v. Hazard*. 580
  6. In an action against the widow and children, and also the personal representatives of an intestate, to set aside a deed from such intestate to such widow and children, claimed to be fraudulent as against creditors, and for sale or mortgage of the lands so conveyed, to pay debts, the roll of a judgment recovered by the plaintiff, in an action against the personal representatives of such intestate, upon simple contract debts accrued before his death and before such deed was given, is not competent evidence against such grantees. *Sharpe v. Freeman*. 802
  7. Such judgment does not render the claim of the creditor a judgment debt, as to the grantees or heirs-at-law of the intestate. *Id.*
  8. Nor does such judgment preclude the heirs-at-law from interposing the statute of limitations to the claims upon which it was recovered. *Id.*
- ADMINISTRATORS AND EXECUTORS.**
- See* ACTION, 6.  
ATTORNEY AND CLIENT, 2, 8.  
CONTRACT, 7.  
EVIDENCE, 24, 25.
- ADMISSIONS AND DECLARATIONS.**
- See* EVIDENCE, 8, 9, 10, 21, 22, 23, 28, 30.
- ADVERSE POSSESSION.**
1. Previous to the Revised Statutes, in order to establish a title founded upon adverse possession, as against



one holding the paper title, such possession must have been continued for twenty-five years; but proof of the possession of a cultivated farm in 1806, by one claiming as heir of one who died in 1790, which possession continued until in 1828, will authorize a presumption that such possession continued from 1790 to 1828. *Cahill v. Palmer.* ✓ 478

2. Where the possession is actual, exclusive, open and notorious, under a claim of title adverse to any and all others for the time prescribed by statute, such possession establishes a title. To uphold it, a grant from the true owner to such party may be presumed. *Id.*

#### ANCIENT DEED.

*See EVIDENCE, 18.*

#### ANIMALS.

1. The provisions of the act of 1867, chap. 814, as to the seizure of animals running at large in the public highways, are constitutional and valid. *Campbell v. Evans.* 356
2. It is no objection to the proceedings to be instituted under the act, that personal notice to the owner or other claimant of the property is not made necessary by the act, or essential to the jurisdiction of the magistrates, or that such proceedings are to some extent summary. *Id.*

#### ANTE-NUPTIAL CONTRACT.

*See TRUSTS AND TRUSTEES.*

#### APPEAL.

*See JURISDICTION, 9, 10, 11.*  
*PRACTICE, 2, 3.*  
*WRIT OF ERROR.*

#### ARREST AND BAIL.

1. Under the Code, an order of arrest may be obtained in two classes of cases: in those where the cause of action is identical with the cause of arrest, and in those where facts *dehors* the cause of action constitute the cause of arrest. In the latter class of cases, unless an order of arrest is obtained before judgment, no *ca. sa.* can issue; but if such order of arrest be obtained, and the defendant omits to move to set it aside, or fails in a motion so to do, he is concluded, after judgment, from questioning the right to an execution against his person. *Elwood v. Gardner.* 349
2. In the former class, the defendant may contest the right to arrest upon a preliminary motion to set aside the order, or contest the alleged cause of action upon the trial itself, and if at the trial the plaintiff is permitted to abandon his cause of action as alleged, and to recover upon contract merely, he is not entitled to execution against the person on his judgment. *Id.*
3. In an action brought by the plaintiff to recover damages sustained by him in consequence of the false and fraudulent representations of the defendant, his indorser, as to the solvency of a maker, by which he was induced to accept a note with defendant's indorsement, an order of arrest was obtained upon an affidavit setting forth the same facts as the complaint. The plaintiff, having at the trial abandoned his action for the fraud, and taken judgment against the defendant as indorser merely, issued execution against the person. — *Held*, that the defendant had a right, though failing to set aside the order of arrest before judgment, to have vacated the execution issued against his person. *Id.*
4. Where a third person, under the 197th section of the Code, deposits money with the sheriff, in order that the defendant may be released from arrest, if the plaintiff obtains judgment before bail have justified, he becomes absolutely

entitled to an application of the money to the satisfaction of his judgment. But the claim of a plaintiff, thus seeking to have the property of a third person applied to the satisfaction of the defendant's debt, is *strictissimi juris*. It should be clearly established by proof, and no intendments will be indulged in its favor. *Commercial Warehouse Company v. Graber*. 393

5. Accordingly, where, after bail have been accepted by the deputy sheriff, and, at the request of the deputy, a third person deposits in his hands a sum of money as security to such deputy that the sureties will justify or the defendant surrender himself.—*Held*, that the plaintiff could not have money so deposited applied to his judgment. *Id.*

#### ASSESSMENT AND TAXATION.

1. Since the act of 1855 (Laws 1855, chap. 427), upon return by the town collector of a tax, laid upon real estate, uncollected for want of goods and chattels of which to make the same, the land is to be classed as non-resident, as to such unpaid tax, and all proceedings for the collection thereof must thereafter be had as if it was the land of a non-resident, pursuant to that act. *Newman v. Supervisors of Livingston County*. 676
2. Where the board of supervisors assume to add the amount of a tax so returned to the assessment roll of residents, and thus charge it upon one who has succeeded to the occupation of the land assessed, their action is without jurisdiction and void, and the tax thus laid against him is illegal. *Id.*
3. If such illegal tax is collected and paid into the treasury of a county, an action as for money had and received will lie against the county for its recovery. *Id.*
4. The money having come to the treasury of the county by the wrongful act and with the knowledge of its officers, no demand is necessary before suit, nor is it necessary to present the claim

therefor to the board of supervisors for audit and allowance. *Id.*

5. The action of a board of supervisors, in issuing a warrant for the collection of taxes, is not the act of the several members, as supervisors of the towns respectively, but the corporate act of the county. *Id.*
6. Where lands owned by a city in fee, to be held for the purpose of a public park, are taken for the purpose of widening public streets, under an act of the legislature (Laws 1860, ch. 700, p. 1658), providing for an assessment and payment of the damages sustained by the owners of lands taken for such improvement, the city is entitled to compensation for the land so taken. *Matter of Ninth Avenue and Fifteenth Street*. 729

7. It cannot be held, as matter of law, that the lands embraced in a park are of no more value to the city than the same lands when devoted to the public use as streets, and an award of the damages sustained by the city, by reason of such conversion of park lands into streets, having been confirmed by the Supreme Court, in the absence of any legal error, is conclusive. *Id.*

#### ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

1. A bill of sale, though absolute upon its face, may be shown by parol evidence to have been given in trust for creditors. *Britton v. Lorens*. 51
2. The provisions of chap. 348, of Laws of 1860, apply to instruments which, though absolute upon their face, are in fact made in trust for creditors, and such instruments, when not properly acknowledged, as by that act required, are void. *Id.*

#### ATTORNEY AND CLIENT.

1. The statute of limitations does not begin to run upon the claim of an attorney for services and

disbursements until the termination of the proceeding in which they were rendered and disbursed, where his employment was to conduct such proceeding to its termination. *Mygatt v. Wilcox*. 306

2. Executors and administrators are personally liable for the services of an attorney on their final accounting, rendered upon their retainer. *Id.*

3. Administrators, who retain an attorney to attend for them in proceedings against them on a final accounting before the surrogate, are jointly liable to such attorney, although their interests upon a distribution are different. *Id.*

4. Interest is recoverable upon an attorney's account from the time it is rendered to the client. *Id.*

5. A party receiving an injury from the wrongful acts of others, is entitled to but one satisfaction, and an accord and satisfaction by, or a release or other discharge by the voluntary act of the party injured, of one, of two or more joint *tortfeasors*, is a discharge of all; but an attorney-at-law, as such merely, cannot settle a suit and give a release concluding his client in relation to the subject in litigation, although it is within his authority to discontinue the action. *Brassett v. The Third Avenue Railroad Company*. 628

6. An attorney is not authorized by his retainer to satisfy a judgment without payment, and if he does so, the court will set such satisfaction aside; and although an attorney should hold the judgment by assignment, as security for debts due from his client, his satisfaction without payment is good only for the amount of his interest. *Beers v. Hendrickson*. 665

See CONTRACT, 16.

MANDAMUS.

PRIVILEGED COMMUNICATIONS.

#### ATTACHMENT.

1. In this State a title acquired under foreign bankrupt or insolvent

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proceedings will not prevail over the lien of creditors attaching under our own laws property found here. *Kelly v. Crapo*. 86

2. Accordingly, where, in a suit commenced in this State against foreign debtors, citizens of Massachusetts, a warrant of attachment had been issued, and, upon the arrival of a seagoing vessel at the port of New York, such debtors' interest in the ship was seized by the plaintiff, as sheriff, under such attachment, and the defendants claimed as assignees of such debtors, appointed under the insolvency laws of Massachusetts prior to the issuing of the warrant.—*Held*, that the lien acquired by the levy must prevail over the title of such assignees; and this, although, at the time of the assignment, the vessel was not within our territory, but in the Pacific ocean. *Id.*

3. To constitute a levy upon real estate under an attachment, nothing more is required to be done by the officer, than some act with intent to make the property liable to the process. This will constitute a seizure, and create a lien against the debtor, and all claiming under him by title subsequently acquired, except *bona fide* purchasers and encumbrancers. *Rollers v. Bonner*. 379

4. Where a levy is made upon real estate, under an attachment, it is not necessary that the officer making the the levy should leave with the person in possession a certified copy of the warrant of attachment. *Id.*

#### BAGGAGE.

See COMMON CARRIERS, 7, 10.

#### BAIL.

See ARREST AND BAIL.

#### BAILMENT.

See COMMON CARRIERS.

## BANKS AND BANKING.

1. The certificate of stock in a national bank contained a provision that the stock was not transferable until all the liabilities of the stockholder to the bank were paid.—*Held*, that such an agreement gave the bank no lien upon the stock for subsequent indebtedness of the stockholder, and was void as prohibited by the act of Congress (act of 1864, 13 U. S. Statutes, 99). The bank could only acquire an interest in its stock by a purchase, to prevent a loss upon a debt previously contracted in good faith.—*Held*, also, that a debt due from the stockholder, arising from collections made by him for the bank, was a "loan" within the meaning of the act. *Conklin v. The Second National Bank of Oneogo*. 655
2. The plaintiff deposited with the defendant certain bonds, as security for a loan payable on demand, and subsequently made overdrafts upon his account with the defendant to a large amount. The defendant, learning of such overdrafts, and claiming a banker's lien upon the bonds therefor, as well as for the loan, and being unable to give notice or make demand upon the plaintiff, sold the bonds, without any demand or notice, and at private sale. The surplus of avails, after satisfying the loan, was credited upon the overdraft, but afterwards the defendant sold and transferred to a third person the whole amount of such overdraft. The plaintiff, after tender of the amount of the loan and demand of the bonds, sued for the conversion thereof.—*Held*, that the sale of the bonds at private sale was unauthorized, and the plaintiff could elect, either to affirm such sale and claim the benefit of the surplus in reduction of his overdraft, or repudiate the sale and credit of surplus and hold the defendant responsible for the bonds; *held*, further, that the plaintiff having repudiated the sale, the defendant's transfer of its claim on account of overdraft precluded it from using any part thereof by way of offset or counter-claim, notwithstanding the consideration for

such transfer was much less than the amount so overdrawn. *Strong v. National Mechanics Banking Association*. 712

3. When a genuine check, drawn by one of its customers upon a bank, is presented by the drawer to that bank for deposit, it is substantially a demand of payment by the holder of the check. If the bank accepts the check and pays it, either by delivering the currency, or giving the party credit for it as a deposit, the transaction is closed between the bank and such party. And where the amount of a check, so presented, was credited to the holder upon his deposit ticket by the officers of the bank.—*Held*, the bank became liable for the amount of the check, although on the same day, and before the close of banking hours, but after it had paid other checks of the drawers presented later, it returned the check to the depositor as not good, and although the account of the drawer was overdrawn at the time of the deposit. *Oddis v. The National City Bank of New York*. 735
4. In the case of a deposit of a check drawn upon itself, the bank becomes at once the debtor of the depositor, and the title to the deposit passes to the bank. *Id*.

## BILLS OF EXCHANGE.

1. If commercial paper, when received upon the sale of property, by the vendor, at the risk of the vendee as to its payment, or as a security upon a pre-existing debt, becomes valueless through the laches of the party receiving it; the loss must be borne by him and he cannot recover the price of his goods or his debt. *Darnall v. Morehouse*. 64
2. When a genuine check, drawn by one of its customers upon a bank, is presented by the drawee to that bank for deposit, it is substantially a demand of payment by the holder of the check. If the bank accepts the check and pays it, either by

delivering the currency, or giving the party credit for it as a deposit, the transaction is closed between the bank and such party. And where the amount of a check, so presented, was credited to the holder upon his deposit ticket by the officers of the bank.—*Held*, the bank became liable for the amount of the check, although on the same day, and before the close of banking hours, but after it had paid other checks of the drawers presented later, it returned the check to the depositor as not good, and although the account of the drawer was overdrawn at the time of the deposit. *Oddie v. The National City Bank of New York.* 735

3. In the case of a deposit of a check drawn upon itself the bank becomes at once the debtor of the depositor, and the title to the deposit passes to the bank. *Id.*

*See* BONA FIDE HOLDER.  
HUSBAND AND WIFE, 5, 6.  
PAYMENT, 1, 2.

#### BILL OF LADING.

*See* COMMON CARRIERS, 12, 23.

#### BILL OF PARTICULARS.

The addition of the words, "per agreement" to the items of a bill of particulars, does not preclude proving and recovering the value of the services specified in such bill, although an agreement for the payment of a specified sum is not proved. *Robinson v. Weil.* 810

#### BOARD OF SUPERVISORS.

*See* ASSESSMENT AND TAXATION, 2, 5.  
SUPERVISORS.

#### BONA FIDE HOLDER.

1. Proof of a diversion of commercial paper from the purpose for which it was delivered by the ma-

ker, casts upon the holder the burden of showing that he is, or has succeeded to the rights of, a *bona fide* holder. *Farmers' and Citizens' National Bank v. Noxon.* 762

2. A note made by N. for \$5,000, indorsed by K., was delivered to C. to be discounted for the benefit of N. C. kept an account with the plaintiff's bank, in the name of "C. agent," and was known to the plaintiff to be in embarrassed circumstances; but was also known to be doing business as a broker, under the same name, and had been in the habit of procuring the plaintiff to discount notes, as large in amount as N.'s note, made and indorsed by others, and which were paid. He delivered N.'s note to the plaintiff, with other collaterals, as security for what he then owed, or might thereafter owe, and was permitted to overdraw his account some \$8,000. Afterwards the plaintiff discounted for C. his own note for \$18,000, taking N.'s note, with others, as security, and credited the proceeds on C.'s account. C. then drew out over \$9,000, which left a balance to his credit, after satisfying his draft.

*Held*, in an action by the plaintiff upon N.'s note, that the circumstances under which it was received did not show that it was not taken in good faith; that the plaintiff became a *bona fide* holder of it as security for C.'s overdraft, and was a *bona fide* holder of the note, as security for the payment of C.'s own note. *Id.*

#### BROKER.

1. A contract for the purchase and sale of shares of the stock of a railroad corporation, at a specified price, "payable and deliverable, seller's option, in this year, with interest at the rate of six per cent per annum," effects a sale *in present*, the vendor becoming a quasi trustee for the purchaser, and the latter is entitled to all dividends accruing on such shares thereafter. *Currie v. White.* 822

2. When the vendor gives notice within the time, of his option to deliver, the rights of the parties become the same as though the time of delivery named by him had been specified in the original contract. *Id.*
3. If the purchaser, pursuant to such notice, at the time named therein, offers and is ready to take and pay for the stock, and the vendor neglects to deliver or offer to deliver, a tender of the money is not necessary, as payment and delivery are to be simultaneous. *Id.*
4. Assuming the power of the directors of a corporation to increase its capital stock, and to require the deposit or payment of money by subscribers to the new stock, such vendor is not bound to advance his own money for the purpose of preserving the right to the new shares which attached to the shares so sold. Unless the purchaser provides him with the means, he cannot claim that it is the fault of the vendor, that the stock purchased has not been increased. *Id.*
5. If the purchaser makes distinct and separate demands, one for the shares purchased, with dividends accrued thereon, the other for the additional shares of new stock, he may recover the subject of the former demand, although not entitled to that of the latter. (ALLEN and FOLGER, JJ., *contra.*) *Id.*
3. *Bushnell v. Kennedy* (9 Wall., 387), followed; *Ayres v. The Western Railroad Corporation*. 260
4. *Gridley v. Dole* (4 Comst., 486), approved; *Crater v. Bininger*. 545
5. *Jackson v. Jackson* (1 John., 424), questioned; *Kinnier v. Kinnier*. 535
6. *Lockwood v. Barnes* (3 Hill, 28), approved; *Galvin v. Prentice*. 163
7. *Sturgis v. Spofford* (52 Barb., 436), reversed in part; *Sturgis v. Spofford*. 446
8. *Van Kleeck v. Dutch Church* (20 Wend., 458), explained and distinguished; *Youngs v. Youngs*. 254

## CAUSE OF ACTION.

1. Money paid upon a contract for the sale of goods, invalid under the statute of frauds, cannot be recovered back from a vendor who is ready to perform on his part. *Allis v. Read*. 142
2. And where the vendor has subsequently sold and delivered the goods to a third person, at the request of the purchaser, this, if not sufficient to constitute an acceptance and receipt of the property by such purchaser, will certainly preclude him from using the act of sale and delivery as a rescission by the vendor and a foundation of an action to recover back money paid by him to the vendor on the original void purchase. *Id.*
3. In consideration of the assignment to him by the plaintiff of an interest in a patent, the defendant bound himself to pay the plaintiff \$1,000 before the end of the next year (1865) "or reassign the patent."—*Held*, the year having elapsed without payment, and the defendant having, a few days thereafter, on the money being demanded, offered to reassign, that no action would lie against him upon his obligation to recover the \$1,000. By its terms, he had the option during the whole year to pay the price, and upon his failure

## BURDEN OF PROOF.

See ARREST AND BAIL, 4.  
 BONA FIDE HOLDER, 1.  
 COMMON CARRIER, 9.

CASES COMMENTED ON,  
CRITICISED, OVERRULED,  
ETC.

1. *Bissell v. Balcom* (39 N. Y., 284), commented on; *Allis v. Read*. 142
2. *Burt v. Dewey* (40 N. Y., 283), distinguished; *Bordwell v. Collie*. 494

- to do so within that time, the plaintiff's only remedy was to compel the reassignment, or in case of refusal, to recover whatever might be its value. *Manuel v. Holdredge*. 151
4. Where services are rendered under a contract void by the statute of frauds, no action can be maintained to recover their value, except upon the default of the other party, or his refusal to go on with the contract. *Galvin v. Prentice*. 162
5. An action founded upon the fraud and deceit of the defendant in making false representations, cannot be maintained, in the absence of proof that he believed, or had reason to believe at the time when he made the representations, that they were false, or that he assumed to have, or intended to convey the impression that he had actual knowledge of their truth, though conscious that he had no such knowledge. *Meyer v. Amidon*. 169
6. The plaintiff purchased a ticket of the defendants, a railroad corporation, at a point on their line, for New York, and had his baggage checked for that city. He arrived there by the Hudson River railroad, a connecting line of road, at nine o'clock in the morning, and about noon of that day gave his check to an expressman in the city of Brooklyn, with directions to get the trunk from the depot of the Hudson River railroad for him. The expressman neglecting to do so, when two days afterward, the plaintiff demanded the trunk at the depot, it could not be found. The defendants had, in pursuance of an arrangement with the Hudson River Railroad Company, transferred the baggage to the latter at Albany, and it had been conveyed by them to New York and deposited in their depot. In an action brought by the plaintiff to recover the value of his trunk, and contents.—*Held*, that he was entitled to recover, in the absence of any proof on the part of the defendants accounting for the failure to deliver it. *Burnell v. New York Central Railroad Company*. 184
7. The owner of a peculiar product of nature, like natural mineral water, who has applied to it a conventional name, by which it has become generally known, and under which it has been extensively sold by him as a useful article, is entitled to be protected in the exclusive use of such name, as his trade mark, in the sale of the article. *Congress Spring Company v. High Rock Spring Company*. 291
8. Where the spring first known as and named "Congress Spring" produces natural mineral water of peculiar medical and curative properties, possessed by no other spring, the words "Congress Water," and "Congress Spring Water," appropriately indicate the origin and ownership of the water flowing from Congress spring, and the word "Congress" used in connection with the bottling and sale of such water, is a proper and legitimate business trade mark. *Id.*
9. Where the plaintiffs are the purchasers of the spring and all interest of the original proprietors, who invented and used such trade mark, they are entitled to relief by injunction against sellers of mineral water attempting to appropriate the word Congress as descriptive of the water sold by them. *Id.*
10. The plaintiff purchased from the defendant the supposed note of W., giving his own in exchange. In an action brought by him against W., upon the purchased note, judgment went against him for costs, it being found that the signature was a forgery. The plaintiff, being sued upon his own note by the holder to whom the defendant had transferred it, defended on the ground of want of consideration, and judgment went against him for the amount of the note and costs. In his action against the defendant,—*Held*, that he could recover, together with the amount paid by him in satisfaction of his note, the costs of his unsuccessful action against W. (of which the defendant had notice), but not the costs of his unsuccessful de-

fence upon his own note. *Whitney v. National Bank of Potsdam*. 303.

11. An action will not lie against an owner of land, who, in digging a well upon his own premises, intercepted the percolation or underground currents of water, and thereby prevented their reaching the springs or open running stream on the soil of another. The rule is different when the water has actually reached and become a part of the spring or stream, and is subtracted from it. *The Village of Delhi v. Youmans*. 362

12. Where goods were sold by the plaintiff at Boston, to be delivered at New York, and paid for on delivery, and were forwarded, and the clerk of the plaintiffs being sent on to New York with the carriers' receipt, with instructions to deliver the goods on being paid for them, the pretended purchaser obtained from the clerk the receipt merely "for the purpose of examining the goods," and by its means got possession of the goods, removed them on board the defendant's steamer bound to Havana, and obtained from the defendant, before any notice to him of the fraud, bills of lading thereof, — *Held*, that the defendant was bound to deliver the goods to the plaintiff on demand, and on his refusal was liable for their value. *Bassett v. Spofford*. 387

13. *Quere*, whether, if at the time of the demand, the goods had been loaded in the ship so as to be difficult of access, and their removal and delivery to the plaintiff would have caused expense, and necessarily delayed the voyage, and the defendant had offered to restore the goods on the return of the ship, these facts would have affected the question. *Id.*

14. Where there are no fraudulent representations made, or deceit practiced, and no warranty given of the actual number of acres of a growing crop sold, the vendor is not liable for the discrepancy between the actual number and the number as represented by him.

The same principle is applicable to a claim for damages on account of the condition of buildings sold. *Harsha v. Reid*. 415

15. A covenant by the owner of land not to permit a grist-mill to be erected thereon, is not a covenant running with the land, charging an unnamed assignee. It is a personal contract, binding only the covenantors, and their personal representatives. An action will lie against no one but the covenantor for a breach of this covenant; and a subsequent grantee of the lands will not be liable upon it. *Id.*

16. Upon decreeing specific performance of a verbal contract for the conveyance of real estate, upon the ground of part performance, the court will be governed by the same principles in adjusting the equities of the parties as upon a written contract, valid by the statute of frauds; and if the seller is not able fully to comply with the contract, the buyer has his election, either to have the contract specifically performed, so far as the seller can perform it, and to have an abatement out of the purchase-money, or compensation for any deficiency in the title, quality or other matters touching the estate. *Id.*

17. But a court of equity cannot give a personal judgment in damages against a defendant, for an independent cause of action growing out of a contract void by the statute. An existing equitable cause of action, for a specific performance, will not create and secure to the party an independent cause of action, which would not exist and could not be enforced but for the equitable right of action. *Id.*

18. Accordingly, in the case of an entire verbal contract for the purchase of land, and of a crop of flax growing thereon, under which the purchaser has entered into possession and made partial payments, in an action brought by him for specific performance, with an allegation of damages for breach of warranty as to the flax. — *Held*,



- that such damages were not recoverable. *Id.*
19. The owner of a chattel, having mortgaged it, afterward transferred it to the defendant, who sold to D., who sold to the plaintiff, who himself sold to one S., all the successive vendees purchasing without knowledge of the mortgage. The mortgagee having demanded the property of S, he yielded it up without litigation, and received back from the plaintiff the price paid by him, who, on application to D., his vendor, received an assignment of his claim against the defendant. In the action brought by the plaintiff to recover of the defendant the price he had paid,—*Held*, that the failure to litigate the title either by the plaintiff or his vendee was no defence, and that such last purchaser properly restored the property without compelling the mortgagee to resort to judicial proceedings to establish his claim.—*Held*, also, that although plaintiff had no cause of action directly against the defendant, he could sue as assignee of D., and that D. assigned a good cause of action. *Bordwell v. Collie.* 494
20. An instrument in writing conveyed to the defendant all the interest of A., in certain premises, with a right of entry on breach of condition subsequent.—*Held*, that the defendant, by accepting the conveyance, became bound to perform the stipulations on his part recited therein, although he had not executed it. The right of re-entry being attached to covenants, gave them the force of conditions. *Chamberlain v. Parker.* 569
21. Loss may be sustained, in a legal sense, by the breach of a contract, notwithstanding it can be shown that performance would have been a positive injury to the plaintiff, as in case of a failure to perform an agreement to erect a useless structure upon the plaintiff's own premises; but this rule does not extend to the erection of a structure upon land in which the plaintiff has no interest, and as to which he is under no obligation. *Id.*
22. A verbal agreement was entered into between the plaintiff and defendant, by which the latter agreed to bid off in his own name, and enter into a contract for the purchase of land, and pay from his own funds the necessary amount for that purpose for the joint benefit of both. The plaintiff was to reimburse one-half of the money so paid; the deed to be taken in the name of both.—*Held*, the defendant having bid off the land in his name and taken a contract thereof, but refused to convey one-half of the contract to the plaintiff, that no action would lie to compel the execution of the agreement. *Levy v. Brush.* 589
23. Such an arrangement did not constitute a partnership between them. *Id.*
24. A party in no legal sense commits a fraud by refusing to perform a contract void by its provisions. He has not, in that sense, made a contract, and has a perfect right, both at law and in equity, to refuse performance. *Id.*
25. If an illegal tax is collected and paid into the treasury of a county, an action as for money had and received will lie against the county for its recovery. *Newman v. Supervisors of Livingston County.* 676
26. The money having come to the treasury of the county by the wrongful act and with the knowledge of its officers, no demand is necessary before suit, nor is it necessary to present the claim therefor to the board of supervisors for audit and allowance. *Id.*
- See* ARREST AND BAIL, 5.  
BANKS AND BANKING, 2.  
CONTRACT, 2, 3, 4, 10.  
CONVERSION, 3.  
NEGLECT, 1, 2, 3, 4.  
PARTNERSHIP, 1.
- CHATTEL MORTGAGE.
- See* CAUSE OF ACTION, 19.  
TITLE, 14.

## CHECK.

See *BILLS OF EXCHANGE*, 2, 3.

## COMMON CARRIERS.

1. Common carriers by land are ordinarily bound to deliver or tender the goods to the consignee at his residence or place of business; but when the consignee cannot be found with reasonable diligence, the common carrier may relieve himself from liability by depositing the property in a suitable place for the owner. *Witbeck v. Holland*. 13
2. Carriers by vessels and railways, having transported the goods to their dock or station nearest to the residence of the consignee, and notified him of their readiness to deliver, are not bound to make personal delivery, but this exemption does not extend to express companies. *Id.*
3. On the question of diligence in finding the consignee, evidence as to his being well known in the community is competent. (*GROVER, J.*) *Id.*
4. An absolute refusal by a carrier to deliver goods to a person entitled to receive them constitutes a conversion of them; but if the refusal be qualified, and the qualification attached to the refusal be reasonable, and made in good faith, it does not constitute a conversion. *McEntee v. The New Jersey Steamboat Company*. 34
5. Common carriers deliver property at their peril, and must take care that it is delivered to the right person, for if the delivery be to the wrong person, either by an innocent mistake or through fraud of another, they will be responsible, and the wrongful delivery will be treated as a conversion. *Id.*
6. Accordingly, where the defendants received goods at Albany, to be delivered in New York, addressed to "McEntee, New York," and on their arrival the plaintiff demanded them and offered to pay the charges, but the defendant refused to deliver them, and defendant gave evidence tending to show that the refusal was coupled with an offer to deliver the goods, if the plaintiff would produce any paper showing ownership or authority to receive them.—*Held*, that it should have been submitted to the jury, whether the refusal was qualified; and if so, whether the qualification was reasonable and was the true reason for not delivering the goods. *Id.*
7. Where a common carrier has contracted to transport a passenger and his baggage, although his strict liability as a common carrier ceases upon a failure of the owner to call for his baggage within a reasonable time after its arrival at the place of destination, a modified liability, analogous to that of warehousemen, still exists; and the carrier is bound to exercise ordinary care in keeping and preserving the property until it is called for or disposed of according to law. *Burnell v. New York Central Railroad Company*. 184
8. This obligation is not a new and independent obligation, arising from the unprovided for and accidental circumstance of the property being left in the hands of the carrier, but is imposed by the contract of carriage, and therefore rests upon the carrier with whom the contract was made, although the place of destination is beyond its route. *Id.*
9. The failure of the carrier, in such case, to deliver the property to the owner when demanded, *prima facie* establishes negligence and want of due care; and the *onus* of accounting for the default lies with the carrier. *Id.*
10. The plaintiff purchased a ticket of the defendants, a railroad corporation, at a point on their line, for New York, and had his baggage checked for that city. He arrived there, by the Hudson river railroad, a connecting line of road, at nine o'clock in the morning, and about noon of that day gave

- his check to an expressman in the city of Brooklyn, with directions to get the trunk from the depot of the Hudson river railroad for him. The expressman neglecting to do so, when two days afterward, the plaintiff demanded the trunk at the depot, it could not be found. The defendants had, in pursuance of an arrangement with the Hudson river railroad company, transferred the baggage to the latter at Albany, and it had been conveyed by them to New York and deposited in their depot. In an action brought by the plaintiff to recover the value of his trunk and contents,—*Held*, that he was entitled to recover, in the absence of any proof on the part of the defendants accounting for the failure to deliver it. *Id.*
11. A railroad corporation may bind itself by a contract to carry goods to a point beyond the terminus of its own line of road. *Maghee v. The Camden and Amboy Railroad Company.* 514
12. A contract made by a railroad corporation to transport and deliver goods at a point beyond the terminus of its own line contained the following clause: "Unavoidable accidents of the railroad and of fire in the depot excepted."—*Held*, that in the absence of proof of any other or new contract, this exception would be held to extend to every other carrier through the whole line of transportation, and that in an action against a connecting carrier, the goods having been lost while in its possession, such carrier could claim the benefit of it. *Id.*
13. The place where a carrier is accustomed to receive, deposit and keep ready for transportation or delivery merchandise is a depot, within the general signification of the word. *Id.*
14. When a carrier accepts goods to be carried, with a direction on the part of the owner to carry them in a particular way, or by a particular route, he is bound to obey such directions; and if he attempts to perform his contract in a manner different from his undertaking, he becomes an insurer, and cannot avail himself of any exception in the contract. *Id.*
15. But if it should be shown in such a case that the loss must certainly have occurred from the same cause, if there had been no default or deviation, the carrier should be excused. The burden of proof of this fact, however, is on the carrier. *Id.*
16. Where the contract of a carrier is that the goods should be carried "all rail,"—*Held*, that the necessary crossing of ferries, in the transportation, was not a deviation, and that the contract to carry "all rail" would be performed by the transportation by rail as far as was practicable. If, however, the goods could have been carried by rail, their transportation by any other mode, even for a few miles, would render the carrier liable as an insurer. *Id.*
17. The last paragraph of section 9, act of 1847, with reference to the liability of connecting railroads (chap. 270), does not apply to intermediate railroads, but only to the road which receives the goods. *PECKHAM, J., contra. Root v. The Great Western Railroad Company.* 524
18. Where a railroad company agrees to carry property beyond the terminus of its own road, and receives the goods under such an agreement, it is liable, as a common carrier, for the default of the road running in connection with it, on the route to the place of delivery. The statute of 1847 (chap. 270, § 9) is a mere legislative authorization of such agreements. *RAPALLO, J.* *Id.*
19. But where the carrier merely receives goods marked for a place beyond the termination of his own route, in the absence of proof of an undertaking, express or implied, to carry the goods to their final destination, or of a partnership between the carriers, the company is bound only for the due delivery of the goods to the next

carrier on the route. The statute of 1847 has no application in such a case. *RAPALLO, ALLEN and FOLGER, JJ. (CHURCH, Ch. J., and GROVER, J., contra). Id.*

20. Where goods are received by a carrier for transportation, marked for a destination beyond the terminus of such carrier's route, the notice to the next carrier of their arrival and readiness for delivery need not be actually brought home to the knowledge of such next carrier; but where the uniform custom of doing business between them was for the first carrier to deposit such notice in a special box in its own depot, to which the next carrier had constant access and was accustomed to look for notices, such deposit is sufficient. (*FOLGER, J.*) *Mills v. The Michigan Central Railroad Company.* 622

21. But, in addition to the giving of notice of arrival to the carrier next in the line, a reasonable time must elapse for him to take away, and on his neglect to do so, a storage must be made, or some act, indicating a renunciation of the relation of carrier, be done by the first carrier, to relieve him from a common carrier's liability. And where the first carrier was a railroad company, and the next a propeller line on the great lakes, and it was the custom to ship the goods by the first vessel of the line that could take them after their arrival at the railroad terminus.—*Held*, that the reasonable time which must elapse after notice did not expire until a vessel which, in the ordinary course of business, could receive the goods, had failed to do so. *Id.*

22. The provisions of the charter of the Michigan Central railroad with reference to storage at its depots, and exemption from liability, except as warehousemen,—*Held*, not to affect their liability as an intermediate carrier in such a case. *Id.*

23. When goods are shipped under a verbal agreement for the transportation thereof, such agreement is not merged in a bill of lading, partly written and partly printed,

delivered to the shipper after he has parted with control of his goods, although such bill of lading, by its terms, limited the liability of the carrier and expressed on its face, that by accepting it, the shipper agreed to its conditions. The mere receipt of the bill, after the verbal agreement has been acted on, and the shipper's omitting, through inadvertence, to examine the printed conditions, are not sufficient to conclude him from showing what the actual agreement was, under which the goods had been shipped. *Bostwick v. The Baltimore and Ohio Railroad Company.* 712

See CONFLICT OF LAWS, 3.

#### CONDITION.

See CAUSE OF ACTION, 20.

#### CONFLICT OF LAWS.

1. The *lex loci contractus* determines the nature, validity, obligation and legal effect of a contract, and prescribes the rule of its construction and interpretation, unless it appears to have been made with reference to the laws and usages of some other State or government, as where it is to be performed in another place; when, in conformity to the presumed intention of the parties, the law of the place of performance furnishes the rule of interpretation. *Dike v. The Erie Railway Company.* 113
2. Upon principles of comity, effect is sometimes given by the courts of a State to foreign laws; but in matters of contract such effect is conceded to the statutes of other States, only to carry out the intent of the parties, never to qualify or vary the effect of a contract made between persons not citizens of such foreign State, or subject to its laws, and not made with reference to those laws. *Id.*
3. Where the plaintiff purchased from the defendant, a railroad corporation, created by the laws of this State, at a station within this State, a passenger's ticket thence to the city of New York, and having taken passage in its cars to be carried thither, received injuries

- upon a portion of the road situated in the State of Pennsylvania, through the negligence of the defendant's servants.—*Held*, that the amount of damages for such injuries, recoverable by him, was not affected by a statute of Pennsylvania limiting the amount of recovery in similar cases. *Id.*
4. *It seems* that the action in such cases, whatever its form, is based upon the contract. ALLEN, J. *Id.*
- See CONSTITUTIONAL LAW, 8, 4, 5. JURISDICTION. 4, 5, 7, 8, 14.
- ### CONSIDERATION.
1. A promise void, when made, for want of mutuality of obligation, becomes valid and binding upon the performance by the promisee of that in consideration of which such promise was made. *Willetts v. Sun Mutual Insurance Company.* 45
  2. Accordingly, where, by the terms of a policy of insurance, the loss was not covered, but the company promised the owner, that, if he would find the property damaged, have it inspected and sold at auction, they would pay the deficiency.—*Held*, that the performance of these conditions by the owner entitled him to recover the deficiency from the company. *Id.*
  8. A promise to extend the time of payment of a debt is void, unless founded upon a good consideration; and a payment of a part of the debt or the interest already accrued, or an agreement to pay interest for the future, is not a sufficient consideration for such a promise; nor will the giving of a new obligation with additional security for a part of the debt be a good consideration for a promise to extend the time as to the residue. ALLEN, J. *Farneles v. Thompson.* 58
  4. The discharge of a legal obligation by a debtor to his creditor is not a sufficient consideration for the promise of the latter. *Id.*
  5. Accordingly where a party, sued upon a note, paid the costs that had accrued in the suit, upon an agreement that it was to be discontinued and he was to have a month further time to pay the note.—*Held*, that the promise to extend the time was void for want of sufficient consideration. *Id.*
  6. The defendant, holding a note made by V., transferred it, at the time signing his own name under that of V. The note subsequently coming into the hands of the plaintiff, he transferred it to C., writing his own name under the defendant's, with the word "surety" added. This transfer was upon a loan of money by C. C. subsequently sued the plaintiff to recover the amount, setting up both the loan and the note. The defendant thereupon requested the plaintiff to defend on the ground of his (defendant's) notice to C., and the latter's neglect to prosecute V., promising to indemnify him as to the costs of such defence. The plaintiff defended unsuccessfully. In the present action brought by him to recover the costs of such defence.—*Held*, that although such notice to and neglect of C. was no defence to the plaintiff, and although a judgment on that issue in the plaintiff's favor would have been no bar to an action against the defendant, yet the promise to indemnify was valid as founded upon a good consideration. *Wells v. Mann.* 327
- See CONTRACT, 2, 7, 8.  
STATUTE OF FRAUDS, 1, 2.
- ### CONSIGNOR AND CONSIGNEE.
- See COMMON CARRIERS, 1, 2, 8.
- ### CONSTITUTIONAL LAW.
1. The provisions of the act of 1867, chap. 814, as to the seizure of animals running at large in the public highways, are constitutional and valid. *Campbell v. Evans.* 356
  2. It is no objection to the proceedings to be instituted under the act,

- that personal notice to the owner or other claimant of the property is not made necessary by the act, or essential to the jurisdiction of the magistrates, or that such proceedings are to some extent summary. *Id.*
3. In the act of 1853 (ch. 467, § 29), providing for the election of commissioners of pilots, the word election was not used in any such sense as it is in the Constitution; or as the result of a choice by the ordinary mode of voting by the people. It is in legal effect an *appointment*, and comes within the meaning of *that* word, as used in the Constitution. The provisions of that act giving the appointment of such commissioners to the chamber of commerce, and the presidents of marine insurance companies, are not in conflict with the Constitution. *Sturgis v. Spofford.* 446
4. An act of congress upon a subject within its jurisdiction, but upon which there has been State legislation, does not have the same effect upon the latter as would its repeal. Such act merely indicates the intention of congress, from that time, to assume the exercise of the powers conferred by the federal Constitution. The State law becomes from that time inoperative but is not repealed; the repeal of the act of congress would leave the State law in full force. *Id.*
5. It cannot be presumed that any rights or interest secured, or obligations incurred under it (the State law), were intended to be interfered with, and hence a penalty incurred under the State law, before the act of congress is passed, may be recovered afterward. *Id.*
6. The time of the adoption of article 6 of the Constitution, intended by the references thereto in that article, is January 1st, 1870. *The People v. Gardner.* 812
7. A county judge, chosen at the general election in November, 1869, and having taken the oath of office, was "in office at the adoption of this article," and entitled to hold his office for the full term of four years thereafter. *Id.*
8. The limitation as to age, expressed in section 13 of that article, applies to county judges, but not to those in office January 1st, 1870, the express language of section 15, that such judges "shall hold their office until the expiration of their respective terms," being controlling. *Id.*
- See MUNICIPAL CORPORATIONS, 4. WAIVER.
- ### CONSTRUCTION.
1. It is only when there is an inconsistency or repugnancy between them, which is irreconcilable, that the written parts of an agreement prevail over the printed. *Barhydt v. Ellis.* 107
2. The *lex loci contractus* determines the nature, validity, obligation and legal effect of a contract, and prescribes the rule of its construction and interpretation, unless it appears to have been made with reference to the laws and usages of some other State or government, as where it is to be performed in another place; when, in conformity to the presumed intention of the parties, the law of the place of performance furnishes the rule of interpretation. *Dike v. The Erie Railway Company.* 113
3. Upon principles of comity, effect is sometimes given by the courts of a State to foreign laws; but in matters of contract such effect is conceded to the statutes of other States, only to carry out the intent of the parties, never to qualify or vary the effect of a contract made between persons not citizens of such foreign State, or subject to its laws, and not made with reference to those laws. *Id.*
4. A deed with covenants for quiet enjoyment contained the following clause: "Reserving always a right of way, as now used, on the west side of the above described premises, for cattle and carriages, from the public highway to the piece

of land now owned by R."—*Held*, that, although strictly a *reservation* in a deed is ineffectual to create a right in any person not a party thereto, yet there being, in fact, a right of way existing, at the time of the grant in R., such clause must be construed as an *exception* from the property conveyed; and that the grantor was not liable to the grantee as for a breach of his covenant. *Bridger v. Pierson*. 601

5. Where the language used is susceptible of more than one interpretation, courts will look at the surrounding circumstances existing when the contract was entered into, the situation of the parties and of the subject-matter of the instrument. To this extent, extraneous evidence is admissible to aid in the construction of written contracts. *Id.*

6. A certificate of acknowledgment, taken in 1828, stating that the persons acknowledging were known to the officer "to be the persons who executed" the deed, was a substantial compliance with the statute. *West Point Iron Company v. Reymert*. 703

See COMMON CARRIERS, 16.  
CONSTITUTIONAL LAW, 3, 6, 7, 8.  
INSURANCE, FIRE, 8.

### CONTEMPT.

See INJUNCTION, 4.  
PRACTICE, 32.

### CONTRACT.

1. Any agreement made by one creditor for some advantage to himself over other creditors, who unite with him in a composition of their debts, in ignorance of such agreement, is fraudulent and void. *Bliss v. Matteson*. 22

2. A parol agreement by the defendant to take a share in the plaintiff's interest in a trading adventure, is valid and binding, although the only consideration passing from the defendant to the plaintiff for such share, or his right to take

it, was the obligation to share in the losses. Upon such an agreement, the plaintiff may maintain an action against the defendant to recover contribution of the losses of the adventure. *Coleman v. Eyre*. 88

3. The plaintiff's promise to account to the defendant for one-half of the profits, is supported by the obligation incurred by the defendant to share one-half of the losses, and hence it is a case of mutual promises, reciprocally binding. *Id.*

4. The agreement was not within the clause of the statute of frauds, requiring agreements for the sale of goods to be in writing. *Id.*

5. The defendant, owner of a vessel, entered into negotiations with the plaintiff to repair her. The plaintiff refused to limit the expenses to any fixed sum, but stated that, at a rough guess, he supposed the repairs would amount to \$6,000 or \$8,000. Afterward the defendant wrote to the plaintiff directing him to make certain specified repairs, to observe the strictest economy, and saying: "If you find on further examination that it (the expense) will be likely to exceed the sum you have named, of \$6,000 or \$8,000, you will at once advise me, as I do not care to go beyond that sum." The vessel was in worse condition than supposed, and the defendant was so informed. The plaintiff's bill amounted to \$12,236.49.—*Held*, that the completion of the repairs named in the letter was the primary and leading intent of the contract without any condition other than the observance of the strictest economy, and that the plaintiff could recover the amount of his bill. *Carl v. Spoford*. 61

6. In consideration of the assignment to him by the plaintiff of an interest in a patent, the defendant bound himself to pay the plaintiff \$1,000 before the end of the next year (1865), "or reassign the patent."—*Held*, the year having elapsed without payment, and the defendant having, a few days thereafter, on the money being de-

as if the action had been brought solely upon the original agreement. *Wallman v. The Society of Concord.* 485

14. A contract was entered into for the building of an organ, to be paid for when completed. The vendee advanced money to the vendor, to secure the payment of which a mortgage was given on the unfinished instrument, payable on demand. Default having been made, the organ was sold by the vendee under the mortgage.—*Held*, that by enforcing the contract upon which the money had been advanced, the vendee did not prevent performance by the vendor, so as to authorize a recovery of the price by the latter. *Id.*

15. A charter party provided that a full cargo under deck should be provided at a fixed rate per ton. It further provided that the cargo should be delivered and received on board, as customary at the place of delivery; and if any lighterage was necessary, it was to be paid by the charterer.—*Held*, in an action by the owner against the charterer to recover full freight, that the contract to provide a full cargo was not performed, by the charterer furnishing coal at a wharf, where by reason of insufficiency of water, the vessel could not take on a full cargo, but where it was practicable to complete the cargo by lighters, and that the fact that the "customary" way of loading at that place was at the wharf, did not relieve the charterer from his obligation to provide lighterage. *Nelson v. Odiorne.* 489

16. Parties engaged in a particular trade, resolved to take measures to test in the courts the validity of a statute affecting their business, and all signed the following paper: "We, the undersigned, hereby agree to pay our share of costs, equally divided, for the purpose of engaging counsel and to bring our cases before the courts."—*Held*, that the instrument gave no authority to any number of the subscribers, less than all of them, to take any action under it, and that the delivery of this paper to the

plaintiff, a counselor-at-law, by a portion of the signers, calling themselves a committee, with a request that he act as counsel for all at a fixed rate, gave to the plaintiff no right of action against any of the other signers. *Smith v. Duchard.* 597

17. When goods are shipped under a verbal agreement for the transportation thereof, such agreement is not merged in a bill of lading, partly written and partly printed, delivered to the shipper after he has parted with control of his goods, although such bill of lading, by its terms, limited the liability of the carrier and expressed on its face, that by accepting it, the shipper agreed to its conditions. The mere receipt of the bill, after the verbal agreement has been acted on, and the shipper's omitting, through inadvertence, to examine the printed conditions, are not sufficient to conclude him from showing what the actual agreement was, under which the goods had been shipped. *Bostwick v. The Baltimore and Ohio Railroad Company.* 712

See CONSTRUCTION, 1, 2, 3.

## CONVERSION.

1. An absolute refusal by a carrier to deliver goods to a person entitled to receive them constitutes a conversion of them; but if the refusal be qualified, and the qualification attached to the refusal be reasonable, and made in good faith, it does not constitute a conversion. *McEntee v. New Jersey Steamboat Company.* 84

2. Common carriers deliver property at their peril, and must take care that it is delivered to the right person, for if the delivery be to the wrong person, either by an innocent mistake or through fraud of another they will be responsible, and the wrongful delivery will be treated as a conversion. *Id.*

3. The plaintiff deposited with the defendant certain bonds, as se-



curity for a loan payable on demand, and subsequently made overdrafts upon his account with the defendant to a large amount. The defendant, learning of such overdrafts and claiming a banker's lien upon the bonds therefor, as well as for the loan, and being unable to give notice or make demand upon the plaintiff, sold the bonds, without any demand or notice, and at private sale. The surplus of avails, after satisfying the loan, was credited upon the overdraft, but afterward the defendant sold and transferred to a third person the whole amount of such overdraft. The plaintiff, after tender of the amount of the loan and demand of the bonds, sued for the conversion thereof.—*Held*, that the sale of the bonds at private sale was unauthorized, and the plaintiff could elect, either to affirm such sale and claim the benefit of the surplus in reduction of his overdraft, or repudiate the sale and credit of surplus and hold the defendant responsible for the bonds; *held*, further, that the plaintiff having repudiated the sale, the defendant's transfer of its claim on account of overdraft precluded it from using any part thereof by way of offset or counter-claim, notwithstanding the consideration for such transfer was much less than the amount so overdrawn. *Strong v. National Mechanics' Banking Association.* 718

#### CORPORATIONS.

1. The directors of a corporation are trustees of its stockholders, and, in a certain sense, of its creditors, and any agreement to influence the action of such directors for the benefit of others, and to the prejudice of the company, is void. *Bliss v. Mathison.* 22
2. An order having been granted by the Supreme Court, under section 58 of article 3 of the Revised Statutes, in reference to proceedings against corporations, in equity (2 R. S., 486), requiring all the creditors of a corporation to exhibit their claims and become parties to the suit, within six months from the first publication thereof, or in default thereof be precluded from distribution.—*Held*, that, at the expiration of the time fixed, a creditor who had failed to present his claim, was wholly excluded from any share of the assets; and this, although he had delivered an account of his claim in accordance with section 81 of article 3 of the same title (2 R. S., 471), before the second dividend. *In the Matter of Harmony Fire and Marine Insurance Company.* 810
3. In an action by preferred stockholders against a corporation to compel the payment of a dividend alleged to be due, and charging that the funds applicable thereto have been diverted to the permanent improvements and additions of the road, the common stockholders may be proper but are not necessary parties. *Thompson v. The Erie Railway Company.* 463
4. The defendant, a stock company, was formed, and A., one of its projectors, subscribed for certain shares of its stock. He employed L. to dispose of stock in the company. The plaintiff, a purchaser from L., sought to rescind his contract of purchase, and to recover from the company the money already paid by him, on the ground of L.'s fraudulent misrepresentations. On the trial, evidence was offered tending to show that the projectors of the company had agreed to subscribe for its whole stock; that A. had no authority to act as its agent, and that any stock ordered by him to be sold was only such as he had subscribed for. This evidence was controverted.—*Held*, that it was error for the court to take from the jury the question of ownership, and whether L. was merely the agent of A., or was also agent of the company.—*Held*, further, that if the plaintiff had purchased stock owned by A., he could not maintain an action against the company for the recovery of money paid for the stock. *Kelsey v. Northern Light Oil Company.* 505
5. The company in its prospectus, set forth a description of ten tracts

of land, or interests in land, which it proposed to purchase. It purchased eight of those specified, but was unable to secure the other two on account of defect in the title.—*Held*, that in an action brought for fraud in the representations of the prospectus, it was error for the court to charge, if upon the prospectus the plaintiff had a right to believe that it was reasonably certain that the company would acquire the property, and that the company was organized with a view to the ownership of those pieces of property, then, if it did not obtain them, the plaintiff would be entitled to recover. *Id.*

*See* BROKER, 4.

### COSTS.

*See* FORECLOSURE, 7.  
PRACTICE, 25.

### COUNTY.

*See* ASSESSMENT AND TAXATION, 1,  
2, 3, 4, 5.

### COUNTY JUDGE.

*See* CONSTITUTIONAL LAW, 7, 8.  
JUDICIARY.

### COVENANT.

1. A covenant by the owner of land not to permit a grist-mill to be erected thereon, is not a covenant running with the land, charging an unnamed assignee. It is a personal contract, binding only the covenantors, and their personal representatives. An action will lie against no one but the covenantor for a breach of this covenant; and a subsequent grantee of the lands will not be liable upon it. *Harsha v. Reid.* 415

2. Where personal property is sold with an express or implied warranty of title, the rule is the same as to eviction as upon a covenant for quiet enjoyment in deeds of real estate. A party, however, holding

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under a covenant for quiet enjoyment, when evicted, may maintain an action against his immediate vendor, or may, at his election, proceed against a remote grantor who has conveyed the land with similar covenants. In the case of personal property, the vendee can only resort to his immediate vendor; there is no privity of contract between the last vendee and a remote vendor. *Bordwell v. Collins.* 494

3. A factory and machinery for distilling paraffine oil is not a "distillery," within the meaning of a covenant against the erection or maintenance of a distillery. *Atlantic Dock Company v. Libby.* 499

4. A limited and specific grant of the right to dig and stone up a certain spring, and conduct the water therefrom through the grantor's land, by a specified pipe, to the grantee's house, with covenant of warranty, does not render the entire premises servient to the easement; and the grantor may lawfully sink another spring, but twenty-seven feet distant, although the effect is to render the first one useless. *Bliss v. Greeley.* 671

5. If a tenant, having the right to remove fixtures erected by him on the demised premises, accepts a new lease of such premises, including the buildings, without reservation or mention of any claim to the buildings, and enters upon a new term thereunder, the right of removal is lost, notwithstanding his actual possession has been continuous. *Loughran v. Ross.* 792 ✓

6. The subsequent removal of such erection by the tenant, before expiration of the second term, being without legal right, is not a breach of covenants of seizin and for quiet enjoyment in a deed by the landlord. *Id.*

*See* CONSTRUCTION, 4.

### CRIMINAL LAW.

1. Upon the return of a writ of error to the Oyer and Terminer, the

- Supreme Court has no power to order the cause to be heard on the reporter's minutes taken upon the trial, against the objections of the prisoner, although no bill of exceptions had been made or returned. (GROVER, J.) *Messner v. The People*. 1
2. Upon the trial of the prisoner for the murder of his wife, a witness for the people, who had heard cries proceeding from the house of the prisoner in the night preceding her death, was permitted to testify what these cries indicated, whether the person was crying from joy or grief.—*Held* error, and that the question called for the conjecture of the witness as to the cause of the cries, and not for a description of them. (PECKHAM and ALLEN, JJ., *contra*.) *Id.*
  3. Statements made by the deceased shortly preceding her death, in the absence of the prisoner, are not admissible in evidence against him. *Id.*
  4. Where the record failed to show that the prisoner was asked by the court, after the verdict was rendered and before judgment was pronounced thereon, what he had to say why judgment should not be pronounced against him, or that any opportunity was given him by the court at this stage of the proceedings for that purpose.—*Held*, that this omission was error, for which there must be a new trial. (PECKHAM and ALLEN, JJ., *contra*.) *Id.*
  5. In indictments for arson, the ownership of the property to which fire is set must be correctly averred, and a variance between the indictment and the proof in that respect is fatal. *McGarry v. The People*. 153
  6. A corporation existing under the laws of this State cannot, in criminal indictments or other legal proceedings, be properly designated by two names. ALLEN, J. *Id.*
  7. Accordingly, an indictment for arson charging the building fired to have belonged to the "Phoenix Mills Company," and it appearing on the trial that the true corporate name of the company owning the building was "The Phoenix Mills of Seneca Falls."—*Held*, fatally defective, and further by CHURCH, Ch. J., ALLEN and RAPALLO, JJ., (GROVER, PECKHAM and FOLGER, JJ., *contra*) that proof that the company was generally known in the community by the name used in the indictment did not obviate the defect. *Id.*
  8. The prisoner was indicted under the statute (3 R. S., § 4) making it felony to set fire to or burn any building erected for the manufacturing of cotton or woollen goods, or both. It was proved upon the trial that the whole frame of the structure fired, designed for a factory, was not up at the time; that the part which had been raised was not entirely inclosed, the floors were not laid, the stairs were not up, and no part of the building ready for occupation or substantially ready for the reception of the machinery.—*Held* (GROVER, PECKHAM and FOLGER, JJ., *contra*), that this was not a building "erected" within the meaning of the statute, and there could be no conviction of the prisoner under the indictment. *Id.*
  9. If a homicide is committed by one of several persons, in the prosecution of an unlawful purpose or common design, in which the parties have united, and to effect which they have assembled, all are liable to answer criminally for the act; and if such homicide committed within the common purpose is murder, all are guilty of murder. *Ruloff v. The People*. 213
  10. It is not necessary that the common guilty purpose of resisting to the death any person who should endeavor to apprehend them, must have been formed when the parties went out with the common design of committing larceny, to render all principals in a murder by one of them, perpetrated while making such resistance. *Id.*

11. One who is opposing and endeavoring to prevent the consummation of a felony by others may properly use all necessary force for that purpose, and resist all attempts to inflict bodily injury upon himself, and may lawfully detain the felons and hand them over to the officers of the law. Although the use of wanton violence and the infliction of unnecessary injury to the person of the criminals is not permitted, yet the law will not be astute in searching for such line of demarcation in this respect as will take the innocent citizen, whose property and person are in danger, from its protection, and place his life at the mercy of the felon. *Id.*

12. Upon a criminal trial, the presiding judge has no right, in charging the jury, to allude to the fact that the prisoner has not availed himself of the statutory privilege of being a witness in his own behalf; but where such allusion is made, and subsequently, upon his attention being called to it, he states to the jury that there was no law requiring the prisoner to be sworn, and no inference to be drawn against him from the fact of his not being sworn.—*Held*, that this cured the error. *Id.*

13. Upon a criminal trial, photographic likenesses, taken after death, of persons whom it is material to identify, may be exhibited to witnesses acquainted with such persons in life, as aids in the identification. *Id.*

14. The prisoner was indicted, as accessory before the fact, to burglary in the first degree, charged to have been committed by several principals; only one of whom had been convicted at the time of the prisoner's trial.—*Held*, that in such a case, the accessory must be tried and convicted as accessory to the convicted principal only; in the same manner as if the convicted principal only was named in the indictment. *Starin v. The People.*  
338

15. If a court, in a criminal case, entertains and decides a material legal question, fundamental in its

character, the decision of which is excepted to before impanneling the jury, and the parties act upon it, such decision should be deemed incorporated into the proceedings on the trial; or, in other words, a part of the trial itself. In such a case, where an objection is taken at the time, it is unnecessary to renew the objection afterward. *Id.*

## DEED.

*See* ACKNOWLEDGMENT.  
CONSTRUCTION, 4, 5.  
COVENANT, 1, 3, 4, 6.

## DEMURRER.

*See* HUSBAND AND WIFE, 3.  
PRACTICE, 23.

## DEPOT.

*See* COMMON CARRIERS, 13.

## DIVORCE.

*See* HUSBAND AND WIFE, 3, 4.

## EASEMENT.

1. A limited and specific grant of the right to dig and stone up a certain spring, and conduct the water therefrom through the grantor's land, by a specified pipe, to the grantee's house, with covenant of warranty, does not render the entire premises servient to the easement; and the grantor may lawfully sink another spring, but twenty-seven feet distant, although the effect is to render the first one useless. *Bliss v. Greeley.* 671 ✓

## EMINENT DOMAIN.

1. Where appraisers are appointed to determine the value of the property to be taken for public purposes,

not only the examination must be had, but the determination must be made at a meeting at which all are present. *Board of Water Commissioners of Cohoes v. Lansing.* 19

2. In the exercise of the right of eminent domain, the legislature are the sole judges to what extent the public use requires the extinguishment of the owner's title, and their power in this respect (subject always to the necessity of making full compensation), is not limited by any constitutional restriction. The nature of the right acquired by the public in such cases, whether an absolute title to, or a mere easement in the lands, depends, therefore, upon the intention of the legislature, to be deduced from the act authorizing the condemnation. *Brooklyn Park Commissioners v. Armstrong.* 234

3. Where lands owned by a city in fee, to be held for the purpose of a public park, are taken for the purpose of widening public streets, under an act of the legislature (Laws 1869, chap. 700, p. 1658), providing for an assessment and payment of the damages sustained by the owners of lands taken for such improvement, the city is entitled to compensation for the land so taken. *In Matter of Ninth avenue and Fifteenth street.* 729

See RAILWAYS, 3, 4, 5.

### EQUITY.

1. A court of equity has power to compel the surrender and cancellation of written instruments, obtained by fraud, or held for inequitable and unconscientious purposes. The exercise of this jurisdiction is in the sound discretion of the court, depending upon the special circumstances of each case; and it is not material, upon the question of jurisdiction, that the party seeking the relief has a defence at law to the instrument of which he prays the surrender and cancellation. *McHenry v. Hazard.* 580

2. Where a defendant may obtain the equitable relief to which he is entitled, in an action brought against him, he can, nevertheless, during the pendency of such suit, bring an action in his own behalf to accomplish the same result. *Id.*

3. An obligation was obtained from the plaintiff by fraudulent representations. A and B both claimed to own it by assignment. Each commenced an action against him, and claimed in hostility to each other.—*Held*, that he might, during the pendency of the actions against him, bring a separate suit against both claimants, to be relieved from the contract, on the ground of fraud therein, and was entitled to the decree of the court against them ordering its surrender and cancellation, upon establishing the fraud. *Id.*

See CAUSE OF ACTION, 16, 17, 18.  
JURISDICTION, 16.

### ERROR.

See FRAUD, 5.  
INSURANCE (FIRE), 2.  
TRIAL, 1, 2, 4, 5, 6, 7, 9, 10.

### ESTOPPEL.

1. The plaintiff having contracted to deliver to the defendant \$25,000 in gold, at a certain rate, a dispute arose between the parties as to whether he had fulfilled the agreement, or had fallen short \$5,000.—*Held*, that the receiving back by the plaintiff of \$20,000, which the defendant claimed was all that had been delivered, and the re-delivery of this, together with \$5,000 more, by the plaintiff, and receiving payment therefor, under the protest on his part that he had already delivered the whole \$25,000, and that he delivered the additional \$5,000 as an independent transaction, and not under the contract, was no estoppel to his action to recover the price of the controverted \$5,000 claimed by him to have been included in the first delivery. *Moyer v. Clark.* 286

2. The parents of an infant of six years, made and executed a quit-claim deed of certain real estate to her, which was recorded. Subsequently, the parents executed a deed of the same property in trust to the appellant, under which trust he made large advances of money. The mother's name was signed to this deed by the infant (then being about sixteen years of age), at the request of the mother.—*Held*, that, in the absence of intentional fraud upon her part, the infant would not be estopped by this act from claiming title under her previous deed. *Spencer v. Carr.* 406
6. A bill of sale, though absolute upon its face, may be shown by parol evidence to have been given in trust for creditors. *Britton v. Lorenz.* 51
7. The provisions of chap. 348, of Laws of 1860, apply to instruments which, though absolute upon their face, are in fact made in trust for creditors, and such instruments, when not properly acknowledged, as by that act required, are void. *Id.*
8. All communications made by a client to his counsel, with a view to professional advice or assistance, are privileged, whether such advice relates to a suit pending or contemplated, or to any other matter proper for such advice or aid; but communications made in the presence of all the parties to the controversy are not privileged, and this exception includes a case where the communications were made by the plaintiff's assignor in trust for creditors, in the presence of the defendant, to the attorney employed to draw the papers between them. *Id.*

See EVIDENCE, 28.

#### EVIDENCE.

1. Upon the trial of the prisoner for the murder of his wife, a witness for the people, who had heard cries proceeding from the house of the prisoner in the night preceding her death, was permitted to testify what these cries indicated, whether the person was crying from joy or grief.—*Held*, error, and that the question called for the conjecture of the witness as to the cause of the cries, and not for a description of them. (PECKHAM and ALLEN, JJ., contra.) *Messner v. The People.* 1
2. Statements made by the deceased shortly preceding her death, in the absence of the prisoner, are not admissible in evidence against him. *Id.*
3. On the question of diligence in finding a consignee, evidence as to his being well known in the community is competent. (GROVER, J.) *Witbeck v. Holland.* 18
4. The report or certificate of an officer is evidence only of facts which, by law, he is required or authorized to certify. *Board of Water Commissioners of Cohoes v. Lansing.* 19
5. A transcript of minutes extracted from the docket of a court, is not admissible in evidence under the act of congress of 26th May, 1790. *Pepin v. Lachenmeyer.* 27
9. In an action against a railroad corporation to recover for injuries to the plaintiff, a passenger, the defendant's track superintendent being asked, on his cross-examination by the plaintiff, if he had not stated that he was not to blame for the accident, and that he could not get ties or materials to repair the road, answered that he had no recollection of such statement. Afterwards a witness called by the plaintiff was permitted, against the objection of the defendant, to answer the following question: "Will you state what you heard Townsend (the superintendent) say on Sunday morning about the track, and about his application for materials to put it in order, and what was said to him that drew it out?"—*Held*, that the question was proper as affecting Townsend's credibility, he having testified that the road was in good order at that point. *Sloan v. New York Central Railroad Company.* 125

10. In showing inconsistent statements out of court, the usual form is to ask the precise question put to the principal witness, whose credibility is attacked; but the practice in this respect is to some extent under the control and discretion of the court. *Id.*
11. In such an action, a question put to the attendant of the plaintiff, as to how far the plaintiff was able to help herself, and at what point she required assistance to do what was necessary to be done, called for facts, and not mere opinion, and was not objectionable. *Id.*
12. The question to the attending physician of the plaintiff, whether she had the venereal disease while under his care,—*Held*, properly excluded. *Id.*
13. In an action upon *quantum meruit* for two years' services performed under an entire contract for a longer period, void by the statute of frauds, the rate of compensation fixed by the agreement during the whole term is not even *prima facie* evidence as to the value of the services rendered, where, at the commencement of the term of service, the plaintiff was ignorant of the business in which he was employed, and ordinary skill therein was only acquired by instruction and practical experience for a considerable time. *Galein v. Prentice.* 162
14. Upon a criminal trial, photographic likenesses, taken after death, of persons whom it is material to identify, may be exhibited to witnesses acquainted with such persons in life, as aids in the identification. *Ruloff v. The People.* 218
15. In an action to set aside a conveyance of real estate, as fraudulent, brought by the judgment creditor of the grantor against the grantee, the judgment is conclusive evidence of the debt against such grantee, although his grant is prior to the judgment; and testimony to disprove the existence of such a debt, offered by him, is inadmissible. *Burgess v. Simonson.* 225
16. Where the defendant, having purchased all the lumber in the plaintiff's mills at an agreed price per 1,000 feet for the "prime," another price for the "merchantable," and another price for "refuse," and the lumber having been delivered, after opportunity for examination, gave a receipt for so many thousand feet of prime lumber, so many thousand feet of merchantable and so many thousand feet of refuse.—*Held*, in an action for the price, evidence offered by the defendant to show that all the lumber for which the action was brought as "prime," and a large portion as "merchantable," was neither, but in fact "refuse," was properly excluded. (CHUBOX, Ch. J., ALLEN and GROVER, JJ., *contra.*) *McCormick v. Sarson.* 265
17. Negative testimony is ordinarily of less weight than positive, but is not to be disregarded. The jury have a right to consider it, and where a witness testifies that he was in a position to see the whole transaction, and as to certain things testified to by another witness, states positively that they did not occur, and as to other things that he did not see them, there is such a contradiction as would justify the jury in discrediting or disregarding the evidence of either of the witnesses. *Bradley v. Mutual Benefit Life Insurance Company.* 422
18. A deed of certain real estate was given in 1760, the grantee, under it, dying in 1790, and leaving an heir proved to be in possession in 1806, claiming as heir, and who continued in possession until 1828.—*Held*, that, in 1867, the deed might be read in evidence, by such heir's grantee in possession, as an ancient deed, without proof of its execution. *Oahill v. Palmer.* 478
19. Evidence of an insurance agent, as to the reasons why the insurance company with which he was connected had refused to insure certain property, is inadmissible to show the dangerous character of the business carried on upon the property, especially where such agent admits that he has himself

- no personal knowledge of the business. *Atlantic Dock Company v. Libby*. 499
20. In an action to recover for personal injuries caused by the defendant's car, in which the plaintiff was a passenger, leaving the track, alleged to have occurred on account of the defective condition of such track.—*Held* (Chief Judge and PECKHAM, J., *contra*), that the admission of evidence, on behalf of the plaintiff, of the condition of the road at a point half a mile distant from the place of the accident, and evidence that new ties were subsequently put in at points in the neighborhood of the accident, was erroneous. *Reed v. The New York Central Railroad Company*. 574
21. In such an action, where the injuries are claimed to have resulted in a permanent disability of the plaintiff to perform mental or physical labor, the defendants proved that, several months after the injury, the plaintiff had performed such labor. The evidence of the plaintiff in his own behalf that, at the time this labor was being performed, he declared to a person casually present, and with whom he had no business relation, that he then felt ill, was inadmissible, either to controvert the defendant's proof or to show statements of his own out of court consistent with his testimony. (ALLEN, J.) *Id.*
22. *It seems* that since parties have been made by the statute competent witnesses in their own behalf, there is no longer the necessity for giving the declarations of living parties in evidence, which was formerly the reason of the rule admitting them in certain cases; and the reason of the rule ceasing, the rule itself, adopted with reluctance and followed cautiously, should cease. (ALLEN, J.) *Id.*
23. Evidence of declarations by an owner of real estate, made publicly to the bidders assembled at a sheriff's sale thereof, and in the hearing of one who afterward purchases at such sale, that he had no interest in the premises; that the entire title was in the execution debtor and whoever purchased at such sale would get good title, is competent as against the subsequent grantees or the heirs of such owner. If not sufficient of itself to show an estoppel (as to which *quere*), it is error to exclude it, as additional evidence that the purchase was induced thereby might have been given. *Mutton v. Young*. 696
24. In an action upon a note drawn payable to the husband and wife, brought against the maker by the wife, after death of the husband, the maker being an executor and the wife the executrix of his will, evidence that a legacy to the wife was intended in lieu of the note; that such intended provision was with her knowledge and consent, and that she had produced the note to the appraisers and included it in the inventory as assets of the testator, is competent for the defence, to show that she is not "the real party in interest." *Sanford v. Sanford*. 723
25. The maker, on becoming an executor, is as well entitled to hold the note, if assets, as the plaintiff; nor can she, by an action at law, compel him to pay it into her hands. *Id.*
26. An error in transcribing the direction, and a consequent misdelivery of a telegram, is *prima facie* evidence of neglect and want of care in the operator, and casts the burden of proof upon the company of explaining the error and showing that it occurred without fault. *Baldwin v. The United States Telegraph Company*. 744
27. An objection to the admission of a copy, on the ground that it was "incompetent and immaterial," does not raise the question that the paper was improperly admitted, because a copy, and not the original. *Atkins v. Ethell*. 753
28. The protest of the master of a vessel, made in a port of distress, where the owners have presented to the insurers and used such pro-



- test on a claim for insurance, is admissible evidence in behalf of the defendants, in an action brought by such owners, employers of the master, for fraudulent representations as to her condition, alleged to have been made by the defendants upon her sale to the plaintiffs. What constitutes fraud in making a false representation upon a sale, discussed by FOLGER, *J.* *Id.*
29. Proof of a diversion of commercial paper from the purpose for which it was delivered by the maker, casts upon the holder the burden of showing that he is, or has succeeded to the rights of, a *bona fide* holder. *Farmers' and Citizens' National Bank v. Noxon.* 762
30. Declarations or admissions of the surviving partner, relating to his construction of the partnership arrangement, to the effect that he claimed no pecuniary interest in a judgment recovered by his firm, and that the representatives of a deceased partner were entitled to it, do not show want of title in such survivor. *Daly v. Ericsson.* 786
31. When there is evidence tending to show the place of residence and death of one partner, proof of the death at the same place of a person bearing the same name, establishes, *prima facie*, the title of the other partner as survivor. *Id.*
32. Mere lapse of time, less than twenty years from the rendition of a judgment, does not raise a presumption of payment. *Id.*
33. Evidence of the pecuniary ability of the defendant, for many years after the recovery of a judgment against him, does not tend to show payment and is immaterial. *Id.*
34. In an action against the widow and children, and also the personal representatives of an intestate, to set aside a deed from such intestate to such widow and children, claimed to be fraudulent as against creditors, and for sale or mortgage of the lands so conveyed, to pay debts, the roll of a judgment re-
- covered by the plaintiff, in an action against the personal representatives of such intestate, upon simple contract debts accrued before his death and before such deed was given, is not competent evidence against such grantees. *Sharpe v. Freeman.* 802
35. Such judgment does not render the claim of the creditor a judgment debt, as to the grantees or heirs-at-law of the intestate. *Id.*
36. Nor does such judgment preclude the heirs-at-law from interposing the statute of limitations to the claims upon which it was recovered. *Id.*
- See FRAUD, 5.  
TRIAL, 1.
- EXCEPTION.
1. A general exception to all the charge so far as it did not conform to several written requests previously handed up is unavailing. *Regua v. City of Rochester.* 129
- See TRIAL, 2.  
PRACTICE, 5.
- EXCISE.
1. The county commissioners of excise under the excise act of 1857, are superseded by the town commissioners authorized by the excise act of 1870, and are by that act removed from office and deprived not only of the power to grant licenses, but to prosecute for penalties or perform any other duty as commissioners. *Board of Excise v. Gurlinghouse.* 249
2. Actions for penalties commenced by the county commissioners before the passage of the act of 1870 are not thereby abated, but may be continued by the town commissioners, who may be substituted as their successors in office within their respective localities; and, until such substitution, the action

will proceed in the name of the original parties. *Id.*

*See* MANDAMUS.

## EXECUTION.

*See* PRACTICE, 2, 13, 14, 15, 16, 17.

## EXECUTORS.

*See* ACTION, 6.  
ATTORNEY AND CLIENT, 2, 3.  
CONTRACT, 7.  
EVIDENCE, 24, 25.

## EXPRESS COMPANIES.

1. Carriers by vessels and railways, having transported the goods to their dock or station nearest to the residence of the consignee, and notified him of their readiness to deliver, are not bound to make personal delivery, but this exemption does not extend to express companies. *Witbeck v. Holland.* 13
2. The defendants, a joint stock association, carrying on business as expressmen, and who were also freight agents of the Pacific Mail Steamship Company, received from the plaintiff merchandise in a package marked "C. O. D.," to be conveyed from New York to San Francisco, giving him a bill of lading signed by them as agents for the steamship company. At the plaintiff's request, they agreed to deliver the goods to the consignee and to collect the amount due thereon, which amount they were to return to the plaintiff. Subsequently, while the goods were in the defendant's warehouse, and after the consignee had been several times notified to call and take them away, which he had promised to do, they were destroyed by the explosion of a package of nitro-glycerin. In an action brought by the plaintiff to recover the value of the goods,—

*Held*, that he was not entitled to recover, and that the liability of the defendant was that of warehousemen only. *Weed v. Barney.* 344

## FEDERAL CONSTITUTION.

*See* MUNICIPAL CORPORATIONS, 4.

## FINDING OF FACT AND CONCLUSIONS OF LAW.

1. Where a fact necessary to sustain the conclusion of law does not appear in the findings of fact, and the case shows that upon a request to find as to such fact, there was a refusal to find otherwise than as already found, this court will not presume or infer in aid of the judgment a finding of this fact. *Meyer v. Amidon.* 169
2. In an action for false and fraudulent representations as to the solvency of a party, the referee found that the representations made by the defendant were false, that the plaintiffs were induced by them to give credit to such party, and that damages ensued therefrom to the plaintiff, and upon the request of the defendant's counsel to find that the statements were made without fraud, and without intent to deceive, he refused to find "otherwise than as contained in his finding of fact."—*Held*, that upon the facts found, the plaintiff was not entitled to recover, and in view of the refusal to find, the court would not presume the finding by the referee of the necessary fact of intent to deceive or fraud, to sustain his judgment for the plaintiffs. *Id.*
3. The rule that, where there appears in the report no finding by a referee upon particular material facts, the court will, in reviewing the judgment upon appeal, presume, in support of the judgment, that he did find such fact in favor of the party recovering, is only applicable where from the case it appears that such additional finding of fact would have been warranted by the evidence. *Oberlander v. Spiess.* 175

*See* PRACTICE, 4, 29.

## FORECLOSURE.

1. The right of parties to agree upon the terms of a power of sale of mortgaged premises given to the mortgagee is clear, and courts have never assumed to control this right in the absence of fraud or some statutory regulation upon the subject. Parties may, in such cases, contract for private sale, and even without notice. (ALLEN, J.) *Elliott v. Wood*. ✓ 71
2. The statutes of this State regulating the foreclosure of mortgages by advertisement do not apply to mortgages upon real estate situated out of the State. *Id.*
3. The purchaser at a mortgage foreclosure sale is not entitled to the rent of the premises accruing between the time of purchase and the time of delivery of the deed to him. *Cheney v. Woodruff*. ✓ 98
4. Where the plaintiffs, at a foreclosure sale of certain premises on the 10th of July, bid them in, paying ten per cent down, the remainder to be paid on the 30th of July, and, on that day paid the balance, and received a deed of the premises.—*Held*, that they could not maintain an action for the use and occupation between the 10th and the 30th of July. *Id.*
5. In an action for the foreclosure of a mortgage, sale of the premises and satisfaction of the debt secured, all persons having liens upon the equity of redemption are necessary parties. *Morris v. Wheeler*. 708
6. A judgment against husband and wife, for damages and costs, entered in an action of ejectment, duly docketed, is a lien upon the real estate of the wife. If she is owner of the equity of redemption in mortgaged premises, the judgment creditor is a necessary party in an action to foreclose the mortgage. *Id.*
7. Although costs in actions of foreclosure are in the discretion of the court, yet if it appears that such discretion has been exercised un-

der an erroneous view of the law affecting the rights of the parties, it is the duty of the appellate court to correct the error. *Id.*

## FRAUD.

1. Any agreement made by one creditor for some advantage to himself over other creditors, who unite with him in a composition of their debts, in ignorance of such agreement, is fraudulent and void. *Bliss v. Matteson*. 22
2. The directors of a corporation are trustees of its stockholders, and in a certain sense, of its creditors, and any agreement to influence the action of such directors for the benefit of others, and to the prejudice of the company is void. *Id.*
3. An action founded upon the fraud and deceit of the defendant in making false representations, cannot be maintained, in the absence of proof, that he believed, or had reason to believe at the time when he made the representations, that they were false, or that he assumed to have, or intended to convey the impression that he had actual knowledge of their truth, though conscious that he had no such knowledge. *Meyer v. Amidon*. 169
4. To maintain an action for fraud and deceit based upon false representations, the representations must not only be false in fact, but the party making them must believe or have reason to believe them to be false, and such false representations must influence the other party to contract. (Per GROVER J.) *Oberlander v. Spiess*. 175
5. Where the plaintiffs contracted to sell land to the defendants, and the defendants offered in payment certain bonds, which bonds the plaintiffs at first refused to receive, but finally consented to do so, upon the assertion of the defendants that they were good, as good as cash, and the referee found that the bonds were worthless, and the representation was false and made

to induce the plaintiffs to accept the bonds, and that the defendants could not have known such representations to be true, and therefore gave judgment for the plaintiffs; in an action brought by them for fraud and deceit.—*Held*, this conclusion was not authorized by the finding; and *held*, further, that it was error to reject evidence offered by the defendants to show that, prior to the transfer of the bonds, they had made inquiries in respect to their value, and that from such inquiries they believed them to be good. *Id.*

6. A party in no legal sense commits a fraud by refusing to perform a contract void by its provisions. He has not, in that sense, made a contract, and has a perfect right, both at law and in equity, to refuse performance. *Levy v. Brush*. 589

*See* ACTION, 5, 6.  
EVIDENCE, 28.

#### HIGHWAYS.

1. A municipal charter provided that "whenever any street or alley shall have been opened to, or used as such, by the public, for the period of five years, the same shall thereby become a street or alley for all purposes." *Ipsa facto*, by this enactment, an alley so used, became one of the public ways of the city. No formal act of acceptance, other than the acceptance of this charter containing such section, was needed. *Requa v. City of Rochester*. 129
2. An excavation was made in a street, by the authorities of the city of Rochester, so as to cause an abrupt descent from a public alley to the street, and render egress from the alley inconvenient, and not free from danger.—*Held*, that the city was bound to remedy this evil. The power conferred upon them to superintend the streets, imposed a duty to exercise the power in necessary cases. *Id.*

3. If, in such case, the excavation has been bridged by a volunteer, and the city allows the bridge to remain there for years, it makes it its own and must keep it in repair. *Id.*

4. Footmen have no right of way, at a crossing in a city street, superior to that of vehicles. Each has the right of passage in common, and in its use they are bound to exercise reasonable care for their own safety, and to avoid doing injury to others who may be in the use of the right of way with them. *Barker v. Savage*. 191

*See* ASSESSMENT and TAXATION, 6, 7.  
RAILWAYS, 13.  
TRIAL, 4.

#### HUSBAND AND WIFE.

1. At common law, the liability of the husband for the trespasses of cattle, damage feasant, belonging to the wife at the time of marriage, and straying from her land, did not rest upon the ground of his responsibility for her torts. (ANDREWS, J.) *Rouse v. Smith*. 230
2. Although the statutes of this State in regard to married women have not affected the liability of the husband for the torts of his wife, based as that is upon his presumed dominion and control over her person and acts, the statute of 1890, declaring that any married woman "may sue and be sued in all matters relating to her separate property, in the same manner as if she were sole," authorizes an action against her alone for damages done by the straying of her cattle from her own premises upon adjoining lands, notwithstanding her husband and children reside with her upon the lands, and both the land and cattle are used for the support of the family. *Id.*
3. The former husband of the defendant, a resident of Massachusetts, went to Illinois expressly to procure a divorce from her, commenced an action there in the proper court for that purpose, and

she having appeared and permitted, by collusion with him, a decree of divorce to be granted against her, subsequently married the plaintiff here.—*Held*, in an action here, brought to annul the last marriage on the ground of the defendant's former marriage being still in force, that a complaint stating the above facts was insufficient, and a demurrer thereto must be sustained. *Kinnier v. Kinnier*. 535

4. The *lex loci* which is to govern married persons, and by which the contract is to be annulled, is not the law of the place where the contract was made, but where it exists for the time, where the parties have their domicile, and where they are amenable for any violation of their duties in that relation. *Id.*

5. If one loaning money takes a promissory note therefor, payable to the order of himself and wife, this imports a gift to the wife in case she survives him, and delivery of the note to her by the husband is not necessary to perfect the gift. *Sanford v. Sanford*. 723

6. During the husband's life, such note remains subject to his control, and the wife has no legal interest therein until his decease. *Id.*

See FORECLOSURE, 6.  
TRUST AND TRUSTEES.

#### ILLEGAL TAX.

See ASSESSMENT AND TAXATION.

#### INFANTS' REAL ESTATE.

See CONTRACT, 13.

#### INJUNCTION.

1. The owner of a peculiar product of nature like natural mineral water, who has applied to it a conventional name, by which it

has become generally known, and under which it has been extensively sold by him as a useful article, is entitled to be protected in the exclusive use of such name as his trade mark in the sale of the article. *Congress Spring Co. v. High Rock Spring Co.* 291

2. Where the spring first known as and named "congress spring" produces natural mineral water of peculiar medical and curative properties, possessed by no other spring, the words "congress water" and "congress spring water" appropriately indicate the origin and ownership of the water flowing from congress spring, and the word "congress" used in connection with the bottling and sale of such water, is a proper and legitimate business trade mark. *Id.*

3. Where the plaintiffs are the purchasers of the spring and all interest of the original proprietors, who invented and used such trade mark, they are entitled to relief by injunction against sellers of mineral water attempting to appropriate the word "congress" as descriptive of the water sold by them. *Id.*

4. However hastily or improvidently an injunction may be granted, it is not void; it is valid until it shall be annulled by the court granting it, or reversed on appeal, and until such time it is entitled to obedience. If it is disobeyed, the party can be punished for contempt. *The Erie Railway Company v. Ramsey*. 637

5. A court of equity has power, by injunction, to restrain proceedings in another equitable action in the same court, and the Supreme Court, in one judicial district in this State, has jurisdiction in an action brought for that purpose, to restrain, by injunction, proceedings in another action pending in that court, in another district. This jurisdiction should not be exercised except in extreme cases. *Id.*

6. An equitable action was commenced in the Supreme Court;

while it was pending an injunction order was granted by that court in another district, in an action brought for that purpose, restraining proceedings in the first action,—*Held*, that it was not void, but must be obeyed until set aside.

*Id.*

7. Mines, quarries and timber are protected by injunction, upon the ground that injuries to and depredations upon them are, or may cause, irreparable damage, and with a view to prevent multiplicity of suits; nor is it necessary that the plaintiff's right should be first established in an action at law. *The West Point Iron Company v. Reymert.* 703

#### INSURANCE, FIRE.

1. In an action upon a policy of insurance, where the survey referred to in the policy, in the usual manner as a part thereof, is proved to be false and inaccurate, the insured cannot recover, although he did not understand the survey in question to be the one mentioned in the policy. *Leroy v. The Market Fire Insurance Company.* 80
2. Accordingly, a charge that, in such a case, *unless the parties intended the same survey as, and understood it to be, the one in fact named in the policy*, the minds of the parties never met as to the conditions and warranties contained in such survey, but did meet as to the contract of insurance, and the plaintiff could recover thereon without regard to any conditions contained in the survey,—*Held*, error. *Id.*
3. It is not essential to the validity of a contract of insurance, that the person to be insured thereby should be named in the policy. If the name of the person for whose benefit the insurance is obtained, does not appear upon the face of the policy, or if the designation used is applicable to several persons, or if the description of the assured is imperfect or ambiguous, so that it cannot be understood without explanation, extrin-

sic evidence may be resorted to, to ascertain the meaning of the contract. And when thus ascertained, it will be held to apply to the interests intended to be covered by it; and they will be deemed to be comprehended within it, who were in the minds of the parties when the contract was made. *Clinton v. The Hope Insurance Company.* 454

4. In 1863 a policy of insurance on real and personal property was issued by the defendant, upon the written application of the owner to another company and survey annexed thereto. In 1865, R., the insured, having died, his executrix applied, by letter, to the agent of the defendant, with whom the written application above mentioned and survey were filed, for a new insurance upon the same property; and a policy was issued by the defendant, insuring the estate of R. a certain amount upon the factory building and a certain other amount upon the movable machinery therein, "as per survey on file at the office of T., the agent." This policy contained clauses avoiding the policy upon any assignment of property without the assent of the defendant, and making the statements in any survey referred to in the policy, warranties by the insured. Also, a clause that the policy was made with reference to "a survey on file in this office."—*Held*, in an action upon the policy, that an application and survey must have been on file in the office of the company to be effectual as forming a part of the second contract of insurance. The survey on file in the office of the agent, could only be used as a convenient method of identifying the articles of machinery covered by the policy. It did not make the other statements, found in it, a part of the new contract of insurance. *Id.*
5. The party to a contract who seeks to destroy its obligations by reason of an alleged breach of a condition precedent by the other party, cannot establish the existence of such a condition by inference or conjecture. The terms of the contract

- must be clear and explicit in his favor. *Id.*
6. The mother and the guardian of certain infants made a contract to sell real estate and personal property belonging to them, as soon as the guardian could obtain the requisite authority from the court. This property had been insured for the benefit of the "estate." The vendee entered into possession as tenant, paying rent. Much of the property was destroyed by fire before the contract was consummated. None of the papers or orders were filed until after the fire. After that event a new contract was entered into between the same parties, the vendee purchasing the real estate and the claims for insurance, and taking a deed.—*Held*, that the vendee, by the first contract, acquired no title to the property, and by his second contract, the claims to recover the amount insured were not extinguished.—*Held*, further, that the destruction of the property, which fixed the liability of the insurers, at the same time discharged the vendee from his obligation to purchase; and, therefore, that the insurers could not be subrogated to that obligation to the extent of their liability for the insurance. *Id.*
7. A policy of fire insurance taken out by commission merchants upon goods "sold but not removed,"—*Held*, to cover all goods which, having once belonged to the insurers, or having once been held by them on commission, had been fully sold and technically delivered, the title and the right of possession changed, but the articles not yet actually removed from the place of storage. *Waring v. The Indemnity Fire Insurance Company.* 606
8. The law does not forbid that a policy should be so framed as that the insurance shall be inseparably attached to the property intended to be covered, so that successive owners, during the continuance of the risk, shall become, in turn, the parties really insured. *Id.*
9. Agents, commission merchants, or others, having the custody of and being responsible for property, may insure in their own names, and recover of the insurer not only a sum equal to their own interest in the property, by reason of any lien for advances or charges, but the full amount named in the policy, up to the value of the property. *Id.*
10. A person may insure in his own name the property of another for the benefit of the owner, without his previous authority; and such insurance will enure to the party intended to be protected, if adopted by him, even after loss has occurred. It must be shown that insurance of the owner was the intention of the person effecting the insurance, when the contract was made, but such intention need not have fastened, at the time of entering into the contract, upon the very person who, when the contract matures, seeks to take the benefit of it. *FOLGER, J. Id.*
11. Accordingly, where A, the owner of property, effected an insurance upon it, the policy containing this clause, "sold, but not delivered," and subsequently sold it to B, holding it for him without charge, and it was burned,—*Held*, that the risk followed the property, and that an action was maintainable by A for the value of the policy, in trust for B. *Id.*

See CONSIDERATION, 2.

## INSURANCE, LIFE.

1. A policy of insurance contained the following clause: "In case the insured shall die by the hands of justice, or in the known violation of any law of the State he was permitted to visit, the policy should be void, null and of no effect." In an action on the policy,—*Held*, in order to justify the court in taking from the jury the question, whether the deceased came to his death in a manner covered by this clause, that whatever be the nature

of the violation of law claimed as avoiding the policy, the death must have been actually, proximately and not remotely caused by such violations of law, to exempt the company from liability. *Bradley v. Mutual Benefit Life Insurance Company.* 422

2. Accordingly, where the insured attempted to seize B's property, which the former claimed, and B, abandoning the contest for the property, started for his home, but almost immediately turning, shot the insured, killing him,—*Held* (GROVER and PECKHAM, JJ., dissenting), that it was error in the court to refuse to allow the jury to pass upon the question, whether the death of A was caused by a known violation of law on his part, and whether the act of B, which produced the death, was a natural, reasonable or legitimate consequence of the act of A. *Id.*

### INTEREST

*See* ATTORNEY AND CLIENT.

### JUDGMENT.

The execution of an acknowledgment of satisfaction of a judgment, and acknowledging such execution as required by statute, is an act of equal deliberation and solemnity as the execution of an instrument under seal. It is equally effective as an evidence of payment of the judgment, as an instrument executed under seal, and will discharge the judgment, although the consideration therefore is less than the amount due on the judgment. *Beers v. Hendrickson.* 665

*See* FORECLOSURE, 6.  
PRACTICE, 33.

### JUDICIARY.

1. The time of the adoption of article 6 of the Constitution, intended by the references thereto in that article, is January 1st, 1870. *The People v. Gardner.* 812

2. A county judge, chosen at the general election in November, 1869, and having taken the oath of office, was "in office at the adoption of this article," and entitled to hold his office for the full term of four years thereafter. *Id.*

3. The limitation as to age, expressed in section 18 of that article, applies to county judges, but not to those in office January 1st, 1870, the express language of section 15, that such judges "shall hold their office until the expiration of their respective terms," being controlling. *Id.*

### JURISDICTION.

1. Supreme military control in a city is not incompatible with the existence and authority of courts of civil jurisdiction and procedure there. *Pepin v. Lachenmeyer.* 27
2. The acts of a *de facto* judge cannot be attacked collaterally, by showing that he has taken no oath of office, or that he has taken an oath to support a power in insurrectionary hostility to the federal government. *Id.*
3. The secession of the State of Louisiana, attempted or temporarily effected, did not affect the jurisdiction of the civil courts of the State between citizens of that State. *Id.*
4. As a general rule, personal property has no locality, but follows, as to its disposition and transfer, the law of the domicile of the owner. A voluntary conveyance, therefore, valid under the laws of the State where the owner resides, will operate to transfer it wherever situated. But a statutory transfer, in proceedings under State bankrupt and insolvent acts, *in invitum*, can affect only such property as is actually situated within the territory of such State, and has, *proprio vigore*, no force beyond its limits. *Kelly v. Crapp.* 86
5. In this State, a title acquired under foreign bankrupt or insolvent



- proceedings will not prevail over the lien of creditors attaching under our own laws property found here. *Id.*
6. The national territory and its laws are extended, by a legal fiction, to its vessels on the high seas, but no such principle is applicable to the laws or territory of a State. *Id.*
7. No rule of comity requires our courts to subordinate the claims of our own citizens, under process provided by our own laws, to the title derived from statutory transfers in other States. *Id.*
8. Accordingly, where, in a suit commenced in this State, against foreign debtors, citizens of Massachusetts, a warrant of attachment had been issued, and, upon the arrival of a seagoing vessel at the port of New York, such debtors' interest in the ship was seized by the plaintiff, as sheriff, under such attachment, and the defendants claimed as assignees of such debtors, appointed under the insolvency laws of Massachusetts prior to the issuing of the warrant,—*Held*, that the lien acquired by the levy must prevail over the title of such assignees; and this, although, at the time of the assignment the vessel was not within our territory, but in the Pacific ocean. *Id.*
9. The Supreme Court has no jurisdiction to review, on appeal therefrom, an order granting a new trial, made by the City Court of Brooklyn, in an action brought therein. *Baker v. Remington.* 323
10. By the true construction of the act of 1850 (Laws of 1850, chap. 102), an appeal to the Supreme Court at General Term, from that court, can be taken only from a final judgment, upon which appeal an intermediate order necessarily affecting the judgment can be reviewed. *Id.*
11. The jurisdiction was not enlarged by the subsequent amendment of section 344 of the Code made in 1860, authorizing appeals from orders made by a County Court or county judge. *Id.*
12. Accordingly,—*Held*, that a reversal by the General Term of the Supreme Court of an order of the City Court of Brooklyn, granting a new trial on the ground of newly discovered evidence, must, on appeal to this court, be reversed for want of jurisdiction. *Id.*
13. The City Court of Brooklyn, as a court of civil jurisdiction, is a court of record, with jurisdiction unlimited in amount, and possesses all the powers and authority in relation to actions therein, possessed by the Supreme Court as to actions there brought. *Id.*
14. As regards the validity in this State of the decree of a court of competent jurisdiction in a sister State, the *status* of the parties within that State, and the question whether they or any of them were residents of that State, so as to give them a standing in court there, for the purposes of such decree, are to be determined by that court, and their determination thereupon cannot be questioned collaterally in our own. *Kinnier v. Kinnier.* 535
15. Every judgment may be impeached for fraud or want of jurisdiction, and this rule applies as well to judgments of other States as to those rendered in our own. But there must be facts which show it to be against conscience to execute the judgment, and which the injured party could not make available in a court of law, or which he was prevented from prosecuting by fraud or accident, unmixed with any fraud or negligence in himself or his agents. *Id.*
16. A court of equity has power, by injunction, to restrain proceedings in another equitable action in the same court, and the Supreme Court, in one judicial district in this State, has jurisdiction in an action brought for that purpose, to restrain, by injunction, proceedings in another action pending in that court, in another district.

This jurisdiction should not be exercised except in extreme cases. *The Erie Railway Company v. Ramsey.* 687

See CONFLICT OF LAWS.  
PRACTICE, 7, 8.

## JURY TRIAL.

See PRACTICE, 84.

## LACHES.

See BILLS OF EXCHANGE, 1.

## LANDLORD AND TENANT.

1. The provision of the act of 1813 (with reference to New York city, chap. 86, section 181), is clearly intended as a protection to the tenant against his agreement to pay rent, after the demise premises, or a portion of them, have been condemned for a public purpose and as an indemnity to him for the consequent loss or diminution of value of his term. But it does not incapacitate him from making, with his landlord, a contract waiving such protection, if he finds it to his advantage so to do. *Phyfe v. Eimer.* 102

2. Where the defendants took a lease from the plaintiff of certain stores in the city of New York, contracting with special reference to the then anticipated taking of a part of the demised premises for a city improvement before the expiration of the lease, and covenanted that, in such event, they would pay rent up to the time of the removal of such part of the buildings as should be taken, and from that time, the whole lease should be terminated; and after the confirmation of the commissioner's report, they occupied the premises for nearly a year, paying rent, and in November, 1868, obtained an agreement from the plaintiff, indemnifying them against all claims of the city for rent, and they left the premises

January 1st, 1869, the premises not being actually taken by the city till April 17th, 1869.—*Held*, that the plaintiff could recover for the quarter's rent accruing February 1st, 1869. *Id.*

3. Where a building has been injured by fire, the landlord cannot be compelled to rebuild or repair it for the benefit of his tenant, unless he has expressly covenanted to do so; and this rule applies as well to a tenant who has hired a portion of the building which is not directly injured by the fire, as to the lessee of the whole building or of the part destroyed. *Doupe v. Genin.* ✓ 119

4. Accordingly, where the roof and upper story of a building were partly destroyed by fire, and damage resulted to a tenant occupying the basement, by reason of the delay in repairing the roof.—*Held* error to charge the jury that it was the duty of the landlord to proceed with due diligence after the fire and put on the roof, and protect the tenant's property from the weather, and that he was liable for any delay in so doing. *Id.*

5. No such duty arises either from an implied covenant, or from the principle that the landlord, as the owner of the upper portion of the building, must so use it as not to injure the basement rented to the plaintiff. *Id.*

6. If a tenant, having the right to remove fixtures erected by him on the demised premises, accepts a new lease of such premises, including the buildings, without reservation or mention of any claim to the buildings, and enters upon a new term thereunder, the right of removal is lost, notwithstanding his actual possession has been continuous. *Loughran v. Ross.* ✓ 792

7. The subsequent removal of such erection by the tenant, before expiration of the second term, being without legal right, is not a breach of covenants of seizin and for quiet enjoyment in a deed by the landlord to a third person. *Id.*

See FORECLOSURE, 8.  
MEASURE OF DAMAGES, 4  
PRINCIPAL AND SURETY 1, 2.

## LEVY.

See ATTACHMENT, 2, 3, 4.

*Libel infra*  
LIEN.

1. The plaintiff holding a contract for the sale of certain lands, part of the purchase-price of which had been paid by him, transferred the contract to the defendant as security for any advances the latter might make to pay the balance due thereon; and the defendant having paid up the contract and taken a deed to himself, with the assent of the plaintiff contracted to sell a portion of the lands to G., receiving part payment. At the same time, he agreed with G. to advance him money to cut logs on the lot, the defendant to be repaid by taking the logs at agreed prices. —*Held*, in an action to redeem, brought by the plaintiff, that the defendant was not entitled, upon such redemption, to charge the plaintiff with any moneys advanced to G. under the lumbering contract, but must convey to the plaintiff, and assign the contract with G. and the logs on the land to him, upon being paid his advances to buy the land, less the amount received from G. *Kelly v. Falconer.* 42

2. A judgment lien is not an encumbrance within the meaning of section 132 of the Code. A judgment is not a specific lien upon any specific real estate of the judgment debtor, but a general lien upon all his real estate; subject to all prior liens, either legal or equitable, irrespective of any knowledge of the judgment creditor as to the existence of such liens. *Rodgers v. Bonner.* 879

3. The certificate of stock in a national bank contained a provision that the stock was not transferable until all the liabilities of

the stockholder to the bank were paid. —*Held*, —that such an agreement gave the bank no lien upon the stock for subsequent indebtedness of the stockholder, and was void as prohibited by the act of congress (act of 1864, 13 U. S. Statutes, 99). The bank could only acquire an interest in its stock by a purchase, to prevent a loss upon a debt previously contracted in good faith. —*Held*, also, that a debt due from the stockholder, arising from collections made by him for the bank, was a "loan" within the meaning of the act. *Conklin v. The Second National Bank of Oswego.* 655

4. A judgment against husband and wife, for damages and costs, entered in an action of ejectment, duly docketed, is a lien upon the real estate of the wife. If she is owner of the equity of redemption in mortgaged premises, the judgment creditor is a necessary party in an action to foreclose the mortgage. *Morris v. Wheeler.* 708

See ATTACHMENT, 1, 2, 3.  
MECHANICS' LIEN.

## LIMITATION OF ACTIONS.

See ACTION, 1, 8.  
ATTORNEY AND CLIENT, 1.

## LIBEL AND SLANDER.

1. If the application or meaning of the words in an alleged libel is ambiguous, or the sense in which they were used is uncertain, and they are capable of a construction which would make them actionable, although, at the same time, an innocent sense can be attributed to them, it is for the jury to determine, upon all the circumstances, whether they were applied to the plaintiff, and in what sense they were used. *Sanderson v. Caldwell.* 898

2. In an action for libel, it is unnecessary for the plaintiff to prove affirmatively that he sustained

damage in consequence of the libelous publication. The law not only imputes malice to the defendant, but presumes that damages have been sustained by the plaintiff in consequence of the unlawful act of the defendant. *Id.*

3. In libel or slander, the plaintiff cannot, by innuendoes, extend the meaning of the words beyond what is justified by the words themselves, and the extrinsic facts with which they are connected. *Id.*

4. In slander, where the words used have such a relation to the profession or occupation of the plaintiff that they directly tend to injure him in respect to it, or to impair confidence in his character or ability, when, from the nature of his business, great confidence must necessarily be reposed, they are actionable, although not applied by the speaker to the profession or occupation of the plaintiff. When, however, they convey only a general imputation upon his character, equally injurious to any one of whom they might be spoken, they are not actionable unless such application is made. *Id.*

5. But, in an action for libel, the fact that the words used had reference to the profession or business of the plaintiff is not the substantive ground of the action; the actionable quality of the words used does not, in any case, depend upon that consideration. *Id.*

#### MANDAMUS.

1. A county board of commissioners of excise had power to employ an attorney to conduct the prosecutions for penalties, which they were authorized to institute, and as it acts as the agent of the county in so doing, the claims for such services are a county charge. *The People v. Supervisors of Delaware County.* 196
2. An account for such legal services must be presented to the board of supervisors of the county, and

must be audited and allowed by them; but the amount to be allowed, in the absence of express contract or statute, is somewhat in their discretion. But where the same are legally chargeable to the county, it is the duty of the board in good faith to audit them, and on their refusal to act, a mandamus is the proper remedy to compel them. *Id.*

#### MEASURE OF DAMAGES.

1. The defendant purchased from the plaintiff an engine, boilers and other machinery. The engine and boilers were agreed by the plaintiff to be of the best material and workmanship, and in perfect running order. No time was specified for their delivery, but they were to be approved by the defendant's engineer. The boilers, after delivery, were found defective; one of them collapsed at the first trial, and was rendered useless. The defects in the boilers were subsequently supplied by the plaintiff, with the consent of the defendant, and were then accepted by the defendant and approved by his engineer.—*Held*, that the original failure of the boilers was not, after their final acceptance, any defence in an action for the price. Such acceptance, however, was no waiver of a right of action for the damages occasioned by the explosion and loss of use of machinery, and those damages might have been recouped in an action for the price by proper averments in the answer. *Cassidy v. Le Fevre.* 563

2. Such damages, however, were not the difference between what might have been earned by the defendant by the use of the machinery in their factory during the time lost, with the engine and boilers in operation, and what might have been so earned without them, but were limited to the ordinary rent, or hire during that time, which could have been obtained for the use of the machinery whose operation was suspended for want of the steam engine. *Id.*

3. Such damages only may be recovered as may be fairly supposed to have entered into the contemplation of the parties; such as might naturally be expected to flow from a violation of the contract; and such as are certain both in their nature and in respect to the cause from which they proceed. *Id.*

4. The plaintiff leased, to the defendant, certain premises, naming no term and reserving no rent. In the same instrument, the defendant covenanted to sink an oil well on the premises, of a certain depth and by a fixed day. There was a provision for re-entry on breach of the covenant. The defendant having failed to sink the well,—*Held*, that nominal damages only were recoverable by the plaintiff in an action for this breach, and not the cost of sinking such well on the land. *Chamberlain v. Parker.* 569

5. The rule of damages, recoverable for the non-delivery of, or mistake in delivering telegraphic messages, is the natural and necessary consequence of the breach of contract as contemplated by the parties, interpreting the contract in the light of the circumstances under which, and the knowledge by the parties of the purposes for which, it was made; and when a special purpose is intended by one party, but is not known to the other and is not indicated by the message itself, such special purpose will not be taken into account in the assessment of damages for the breach of contract to send. The damages in such a case will be limited to those resulting from the ordinary and obvious purpose of the contract. *Baldwin v. The United States Telegraph Company.* 744

#### MECHANICS' LIEN.

1. A mechanic's lien can only cover labor performed and materials furnished by the party claiming it, including labor performed by persons employed by him and mate-

rials purchased by him on his own credit and used in the construction; but it does not extend to materials or labor (although actually paid for by the claimant) procured by him as the agent for the defendant, and in his name and on his credit. *Kerby v. Daly.* 84

2. Accordingly, where it is found that the plaintiff, the claimant of a mechanic's lien against the defendant, had made a special contract, for and in behalf of the defendant, with a third party, to do certain work on the building, and that he had subsequently paid the whole sum due under such contract.—*Held*, that the sum so paid could not be included in the plaintiff's lien upon the premises. *Id.*

3. Under the statute authorizing "mechanics' liens" in the counties of Kings and Queens (Laws 1862, chap. 478, p. 947), a lien cannot be acquired for work done or material furnished under contract with an equitable owner, as against one holding the legal title, unless the building is constructed by permission of the latter. *Rollin v. Cross.* 766

4. But, if the equitable owner permits the building to be erected, and, before lien filed, by the performance of a contract of purchase becomes the legal owner, the conveyance will be held to relate to the time when the contract of purchase was made, and such owner to be within the statute. *Id.*

5. The lien given by the statute is, in general, a personal right given to the mechanic, material man and laborer, for his own personal protection, and an assignee of his claim is not authorized to file a lien, unless such assignment is for the benefit of the assignor, to be held as by his agent, so that the lien may be preserved. *Id.*

#### MORTGAGE.

1. The right of parties to agree upon the terms of a power of sale of mortgaged premises given to the

mortgagee is clear, and courts have never assumed to control this right in the absence of fraud or some statutory regulation upon the subject. Parties may, in such cases, contract for private sale, and even without notice. (ALLEN, J.) *Elliott v. Wood.* ✓ 71

2. The statutes of this State regulating the foreclosure of mortgages by advertisement do not apply to mortgages upon real estate situated out of the State. *Id.*

3. Where the plaintiff and others, claiming to own a guano island in the Carribean sea, contracted to sell to the defendants one-half of their interest in the island for \$30,000, the defendants to furnish \$20,000 more as a working capital, and to have the sole control and management of the business of mining and selling the guano; and afterward the plaintiff, being indebted to the defendants, gave a mortgage of his interest in the island to them, which contained a power of sale, and by its terms permitted them to purchase at such sale, and this mortgage was subsequently foreclosed, in the manner provided therein, but not in accordance with our statutes, the defendants bidding in the property. — *Held*, that the sale was valid, and that the plaintiff was thereby barred of all interest in the premises. *Id.*

See CAUSE OF ACTION, 19.

#### MUNICIPAL CORPORATIONS.

1. A municipal corporation, was, by an act of the legislature, authorized to take lands for a public park, and the act declares, that the land so to be taken, shall be a public place; and provides that in ascertaining the compensation to be paid the owners, a just and true estimate of the value of the lands is to be made, together with the tenements, hereditaments and appurtenances, privileges and advantages to the same belonging, without deduction for benefits and advantages; and declares that on fulfilling the requirements of the

act, the lands shall vest forever in the city, and that whenever the city shall become vested with the title to the park, as provided, it might sell any building improvements or other material thereon; and authorizes the issue of bonds by the city, to obtain the fund to pay for the lands taken, declaring the lands pledged for the payment of such bonds. — *Held*, that the city acquired an absolute estate in the lands taken under this act and not an easement, and that such title was free from any legally recognizable reversionary right in the owners. *Brooklyn Park Commissioners v. Armstrong.* 234

2. The title of the city, thus acquired, is impressed with a trust to hold the lands for the public use as a park, and it cannot, of itself, convey or dispose of them in contravention of the trust; but it is within the power of the legislature to relieve the city from such trust, and to authorize a sale, free therefrom. *Id.*
3. The right to discontinue the public use of land thus taken and to sell it to private parties, under the sanction of the legislature, exists, notwithstanding the fact that such abandonment and sale, will lessen the value of surrounding property, which has been assessed for the benefit and advantage to it, from the maintenance of such use. There is no contract in such cases, with the owner of such adjacent property to maintain the use. *Id.*
4. Bonds having been issued under such act, and used to raise funds for the compensation paid for the land. — *Held*, that the terms of the act and the issue of the bonds, constituted a contract between the bondholder of the one part, and the city and the State on the other, specifically pledging the land taken for the payment of the bonds, and that a subsequent act of the legislature, authorizing a sale of any portion of the park free of all liens existing by virtue of the original act, was in violation of the federal constitution, as impairing the obligation of contracts. *Id.*

5. *Held*, further, that a provision that the avails of the sales so authorized, should be held as a sinking fund, for the redemption of the bonds when due, did not avoid the objection. *Id.*
6. If a purchaser may sometimes be compelled to take a title, free from reasonable doubt, notwithstanding an objection not certainly and beyond all possible question unfounded; yet when it is ascertained that there is a defect, he may refuse, however remote the probability of his ever being incommoded thereby. *Id.*
7. In proceedings, under the railroad act, to authorize the issue of bonds of a municipal corporation in aid of a railroad, competent common-law evidence of the facts to be established should be produced before the county judge, and, as his determination is binding upon those who do not appear before him, no admission, or other act done or omitted, by those who contest the application, can be regarded as evidence, or affect the rights of those not appearing. *The People ex rel. v. Smith.* 772
8. It is not sufficient that the signatures to the petition be proved, unless such petitioners are in some way identified as the persons named on the "last preceding tax list or assessment roll." If the names upon both are identical, this is *prima facie* evidence that the persons are the same; but the county judge may not act upon his personal knowledge, and, where initials only are given, additional evidence of identity is requisite. *Id.*
9. The authority conferred by the act must be exercised in strict conformity to and by a rigid compliance with the letter and spirit of the statute. *Id.*
10. The petition required is that of the tax-payers, and the act is not satisfied by the petition of an agent. The power conferred is personal, and cannot be delegated; and it is error to include as peti-

tioners those whose names are affixed to the petition, in their absence, under a verbal authority given at some previous time. *Id.*

*See* HIGHWAYS, 1, 2, 3.

## MURDER.

1. If a homicide is committed by one of several persons, in the prosecution of an unlawful purpose or common design, in which the parties have united, and to effect which they have assembled, all are liable to answer criminally for the act; and if such homicide committed within the common purpose is murder, all are guilty of murder. *Ruloff v. The People.* 213
2. It is not necessary that the common guilty purpose of resisting to the death any person who should endeavor to apprehend them, must have been formed when the parties went out with the common design of committing larceny, to render all principals in a murder by one of them, perpetrated while making such resistance. *Id.*
3. One who is opposing and endeavoring to prevent the consummation of a felony by others may properly use all necessary force for that purpose, and resist all attempts to inflict bodily injury upon himself, and may lawfully detain the felons and hand them over to the officers of the law. Although the use of wanton violence and the infliction of unnecessary injury to the person of the criminals is not permitted, yet the law will not be astute in searching for such line of demarcation in this respect as will take the innocent citizen, whose property and person are in danger, from its protection, and place his life at the mercy of the felon. *Id.*

## NATIONAL BANKS.

*See* BANKS AND BANKING, 1.

## NEGLIGENCE.

1. An excavation was made in a street, by the authorities of the city of Rochester, so as to cause an abrupt descent from a public alley to the street, and render egress from the alley inconvenient, and not free from danger.—*Held*, that the city was bound to remedy this evil. The power conferred upon them to superintend the streets, imposed a duty to exercise the power in necessary cases. *Requa v. City of Rochester*. 129
2. If, in such case, the excavation has been bridged by a volunteer, and the city allows the bridge to remain there for years, it makes it its own and must keep it in repair. *Id.*
3. Where the injury to the plaintiff at the bridge was caused by the removal of planks from it, by unknown persons,—*Held*, in his action against the city to recover for such injuries, that no actual notice to the city of the defect was necessary, when ample time had elapsed after the removal, to render it notorious. *Id.*
4. Sufficient time, however, must elapse in such cases, to give constructive notice to the authorities, or they must have actual notice. *Id.*
5. To enter upon a street crossing in a city where the moving vehicles are numerous, and a collision with them likely to produce serious injury, without first looking in both directions along the street, to ascertain whether any are approaching, and, if so, their rate of speed, and how far distant they are from the crossing, is negligence. *Barker v. Savage*. 191
6. It is gross negligence in the operator at a telegraph station to send over the wires a message in the name of, and purporting to come from a cashier of a bank and to be dated at another station, at the request of a party known to the operator not to be such cashier, and presenting no evidence of authority to use his name, which message, addressed to a banking house, held out such party as entitled to credit for a large amount; and this negligence occurs so within the scope of the employment of such operator as to make the telegraph company liable to the person to whom such telegram was addressed for the damages occasioned by such negligence. *Elwood v. The Western Union Telegraph Company*. 549
7. The tracks of two horse railroad companies crossed each other at an acute angle; a car upon each track was approaching the intersection from opposite directions; and a collision occurred.—*Held*, that if the acts of the defendant's servants contributed to the injury, the defendant was liable, although the negligent acts of the persons in charge of the other car also were contributory. *Burgett v. The Third Avenue Railroad Company*. 628
8. The comparative degrees in the culpability of the two will not affect the liability of either. If both were negligent in a manner contributing to the result, they are liable jointly or severally. *Id.*
9. The carrier of passengers has no right to experiment at the risk of those whom he carries. His duty is to exercise the utmost care and caution, and he is liable for slight neglect. *Id.*
10. It is the clear duty of a person as he comes near to and upon a railroad crossing, to use all proper precautions to avoid injury, and the least he can do is to look in both directions. If he does not do so, and this omission contributes to his injury, he is guilty of such negligence as will bar his recovery, notwithstanding the negligence of those in charge of the train in omitting to sound the whistle or ring the bell. *Gorton v. The Erie Railway Company*. 660
11. Where the defendant's railroad is carried across a public highway in such manner and place that those traveling the highway can neither see nor distinctly hear approaching trains until too late to avoid collision with them, the com-



pany is liable for such collision in the absence of negligence of those injured. *Richardson v. The New York Central Railroad Company.* 846

12. Compliance with the statute as to sounding the whistle and ringing the bell is not the whole duty of the company, and will not excuse them in such a case. *Id.*

### NEW YORK CITY.

1. The provision of the act of 1813, with reference to New York city (chapter 86, section 181), is clearly intended as a protection to the tenant against his agreement to pay rent, after the demised premises, or a portion of them, have been condemned for a public purpose and as an indemnity to him for the consequent loss or diminution of value of his term. But it does not incapacitate him from making, with his landlord, a contract waiving such protection, if he finds it to his advantage so to do. *Phyfe v. Eimer.* 102
2. Where the defendants took a lease from the plaintiff of certain stores in the city of New York, contracting with special reference to the then anticipated taking of a part of the demised premises for a city improvement before the expiration of the lease, and covenanted that, in such event, they would pay rent up to the time of the removal of such part of the buildings as should be taken, and from that time, the whole lease should be terminated; and after the confirmation of the commissioners' report, they occupied the premises for nearly a year, paying rent, and in November, 1868, obtained an agreement from the plaintiff, indemnifying them against all claims of the city for rent, and they left the premises January 1st, 1869, the premises not being actually taken by the city till April 17th, 1869.—*Held*, that the plaintiff could recover for the quarter's rent accruing February 1st, 1869. *Id.*

### PARKS.

*See* ASSESSMENT AND TAXATION, 6, 7.  
MUNICIPAL CORPORATIONS 1 to 6.

### PARTIES.

*See* FORECLOSURE, 5, 6.  
PARTNERSHIP, 7.

### PARTNERSHIP.

1. A copartnership was dissolved and a new firm under the same name formed, with the same members, except one, whose place was supplied by the defendant, P. The new firm did not assume the debts of the old firm. B, one of the original partners, induced the plaintiff to furnish him with money, to buy up the debts of the old firm, representing to the plaintiff, that they could be purchased at a large discount. Instead of buying up the old debts, B, upon receiving the money from the plaintiff, delivered to him as such, ante dated notes, drawn and indorsed by him in the firm name, and depositing the plaintiff's money to the credit of the new firm in the bank, checked it out in the firm name, and applied the greater part of it to the payment of the debts of the old firm, all the other defendants being ignorant of the whole transaction. In an action on these notes, brought by the plaintiff,—*Held*, that the new firm were not liable for them, and that he could not recover. *Dounce v. Parsons.* 180
2. Where stockholders in a manufacturing corporation, upon the expiration of its charter, agree to continue the business, and appoint one of their own members as agent with managing powers, and further agree to furnish money to carry on the business in proportion to the amount of stock held by each in the old corporation,—*Held*, that they all became liable as partners as to third persons, and for debts con

tracted by such agent in carrying on the business, on the ground that he had the power as partner to bind the others. And when commercial paper was made by such agent, signing the name of the old corporation by himself as agent, — *Held*, that such paper is enforceable against all the members of the association to its full amount, it appearing that it was understood that the business was to be carried on in the name used in signing the note. *The National Bank of Watertford v. Landon*. 410

3. *It seems* that the fact that the plaintiff, when he took the note, supposed it was a note of the corporation, and was ignorant of its dissolution, did not affect the question of liability. *Id.*

4. Where money is advanced by a partner under no legal obligation to do so, although to be used in the partnership business, he has a right to impose conditions, and prescribe the security for the advance, and the contract then made cannot be varied by any cotemporaneous or prior verbal agreement, or affected by the business relations of the parties. *Crater v. Bininger*. 545

5. There is no rule forbidding one partner to sue another at law in respect of a debt arising out of a partnership transaction, if the obligation or contract, though relating to the partnership business, is separate and distinct from all other matters in question between the partners, and can be determined without going into the partnership accounts. *Id.*

6. The plaintiff being interested in a joint stock company (unincorporated), and the company needing money to pay debts accrued in the partnership business, the defendant and S., being also interested and principal managers of the company, applied to the plaintiff to raise money for that purpose at the bank upon the note of the defendant, payable to and indorsed by S. This he did, and the note being unpaid at maturity, he paid and took a transfer thereof. — *Held*, that he could recover the amount

thereof against the defendant, and that parol evidence to show that, at the time the note was made, the plaintiff agreed to pay one-third of it, was inadmissible to vary the contract. *Id.*

7. In an action upon a chose in action or demand belonging to a partnership, the surviving partner is the real party in interest, although, under an arrangement between the partners, the representatives of a deceased partner are entitled to the proceeds thereof. The test is, was it partnership property at the death of the deceased partner? If so, the debtor cannot insist that such representatives be made parties. *Daby v. Ericsson*. 786

8. The right of assignment is incident to the legal title, and the debtor may not question the consideration therefor. *Id.*

9. Declarations or admissions of the surviving partner, relating to his construction of the partnership arrangement, to the effect that he claimed no pecuniary interest in a judgment recovered by his firm, and that the representatives of a deceased partner were entitled to it, do not show want of title in such survivor. *Id.*

10. When there is evidence tending to show the place of residence and death of one partner, proof of the death at the same place of a person bearing the same name, establishes, *prima facie*, the title of the other partner as survivor. *Id.*

11. An agreement for sharing in the profits of a business is sufficient to constitute a partnership, as to third persons. It is not necessary that the agreement be to share in the losses also. *Mankuttan Brass and Manufacturing Company v. Sears*. 797

See STATUTE OF FRAUDS, 1, 2.

#### PAYMENT.

1. The plaintiff, on the 28th of October, while receiving from the defendant at B., in this State, drafts in payment for cattle sold to him,

stated that he lived at G., in Indiana, that he wanted to go thither on the next train, and that he had just about time to get to it; and the defendant thereupon requested the teller of the drawer of the drafts "to fix him (the plaintiff) out, as he wanted to go by the train;" and the plaintiff took the drafts with him to G., whence they were forwarded to New York, were not presented until the 4th of November, and payment was then refused, the drawees having in the meantime failed.—*Held*, the defendant was discharged and it was error to submit to the jury the question, whether, by this conversation, the defendant had consented to the draft being taken to G., and thereby excused the plaintiff's laches. *Darnall v. Morehouse*. 64

2. Where the defendant testified that, after cattle had been sold and delivered to him by the plaintiff, he went with the plaintiff to a banker and there paid the purchase-price to the bank teller, by whom the plaintiff being asked how he would have it, replied "in two drafts," specifying the amounts, which were made out and delivered to him after being indorsed at his request by the defendant; and the plaintiff did not testify that anything was said between him and the defendant as to drafts, but that after entering the bank, the defendant spoke to the teller, who immediately commenced to fill up a draft, and he, the plaintiff, told him to make two drafts, specifying amounts; the question as to whether or not the plaintiff elected to receive the drafts in payment for the cattle should have been left to the jury. *GROVER, J. Id.*

3. Mere lapse of time, less than twenty years from the rendition of a judgment, does not raise a presumption of payment. *Daby v. Ericsson*. 786

4. Evidence of the pecuniary ability of the defendant, for many years after the recovery of a judgment against him, does not tend to show payment and is immaterial. *Id.*

## PENALTIES.

See ACTION, 2.  
EXCISE, 1, 2.

## PERFORMANCE.

1. The extension of the time for the performance of a contract, is not performance. And where an action is brought to recover the contract price, the plaintiff must show performance by him of the modified contract, or that performance was excused, in the same manner as if the action had been brought solely upon the original agreement. *Wallman v. The Society of Concord*. 485

2. A contract was entered into for the building of an organ, to be paid for when completed. The vendee advanced money to the vendor, to secure the payment of which a mortgage was given on the unfinished instrument, payable on demand. Default having been made, the organ was sold by the vendee under the mortgage.—*Held*, that by enforcing the contract upon which the money had been advanced, the vendee did not prevent performance by the vendor, so as to authorize a recovery of the price by the latter. *Id.*

3. A charter party provided that a full cargo under deck should be provided at a fixed rate per ton. It further provided that the cargo should be delivered and received on board, as customary, at the place of delivery; and if any light-erage was necessary, it was to be paid by the charterer.—*Held*, in an action by the owner against the charterer to recover full freight; that the contract to provide a full cargo was not performed, by the charterer furnishing coal at a wharf, where by reason of insufficiency of water, the vessel could not take on a full cargo, but where it was practicable to complete the cargo by lighters, and that the fact that the "customary" way of loading at that place was at the wharf, did not relieve the charterer

from his obligation to provide lighterage. *Nelson v. Odiorno*. 489

See COMMON CARRIERS, 14, 16.

# PILOTS.

See ACTION, 2.

CONSTITUTIONAL LAW, 3, 4, 5.

# PLACE OF TRIAL.

See PRACTICE, 34.

# PLEADING.

See PRACTICE, 1, 6, 7, 9, 21, 22, 23, 26.

# PRACTICE.

1. Where, in an action brought in the New York Superior Court by the plaintiff as receiver, the complaint merely alleged that he was, by an order of one of the justices of the Supreme Court, "duly" appointed receiver upon the application of a judgment creditor of B., without pleading any judgment or proceeding upon which such appointment was or could be made,—*Held*, that the insertion of the word "duly" authorized proof on the trial of all the facts conferring jurisdiction; and, further, that, upon his appointment as receiver, he had general authority to commence actions, and, having such general power, he could select his tribunal, and was not confined to the court in which he was appointed. *Rockwell v. Merwin*. 166
2. The issuing of an execution upon a judgment rendered in his favor, after bringing an appeal therefrom, and the collection of the amount thereof, is inconsistent with and a waiver of a party's right to prosecute such appeal. *Knapp v. Brown*. 207
3. The plaintiff filed a mechanic's lien upon certain premises leased for a term of years to the defendant B. by the defendant J., by which lease the defendant B. covenanted to make certain alterations, which alterations were made

by B., and to secure the payment of which this lien was filed. In an action brought to foreclose the lien, the referee gave judgment for the plaintiff against B. and dismissed the complaint as to J.; plaintiff appealed, but after notice of appeal, issued execution against B., and collected the amount of the judgment from him.—*Held*, that by enforcing the judgment he had waived his right to appeal; *held*, further, that the complaint was properly dismissed as to the defendant B. *Id.*

4. It is the right and duty of the General Term of the Supreme Court, on appeal to it, in the proper mode, to determine, upon an examination of all the evidence, whether the controverted facts have been correctly found; but where evidence is given, showing some material thing to be probably true, and the fact is so found in this court, it must be assumed to have been correctly found, irrespective of all rebutting evidence of however great strength or weight. *Burgess v. Simonson*. 225
5. Upon the bringing in of a new defendant, pending the trial, a stipulation that the testimony already taken in the case, may stand as against the new party, "subject to all legal exceptions as to its admissibility," secures to him the benefit of such exceptions only as have been already taken, and such as he shall thereafter actually take during the trial. *Id.*
6. On an appeal to this court from a judgment, the order of the Supreme Court, sustaining a demurrer to one of the defendant's answers may be reviewed as an intermediate order involving the merits and necessarily affecting the judgment, although there has been a trial on the issue of fact raised by the other answers, and the judgment was entered upon the decision thereon. *Ayres v. The Western Railroad Corporation*. 260
7. An answer to the jurisdiction of the State court, setting up a removal of the cause to the United States Circuit Court, by filing the

petition and bond with the clerk of the State court, according to the statute of the United States and the practice in such case made and provided, is sufficient in form and not demurrable, although omitting to allege that such filing was at the time of entering the defendant's appearance in the State Court.

*Id.*

8. The restriction of the eleventh section of the United States judiciary act (chapter 20, U. S. Laws of 1789), upon the jurisdiction of the United States Circuit Court as to suits to recover the contents of any promissory note or other chose in action in favor of an assignee, does not apply to suits removed thither from a State court under the twelfth section of the act. *Id.*

9. The court has no power to strike out as sham an answer consisting of a verified general denial of the material allegations of the complaint. *Wayland v. Tyson.* 281

10. In an action against the maker of a note, where the holder claimed title under an indorsement of the payee's name, made by one claiming to be his agent for that purpose, the plaintiff was nonsuited, on the ground of failure to show title in the plaintiff. It appearing upon the trial that the only authority of such agent was in writing not produced, and a motion having been made by the defendant on that ground to strike out his oral testimony of authority,—*Held*, in this court, that the nonsuit was right, and the case not stating what disposition was made of the motion to strike out, it would be presumed, in support of the nonsuit, that it is was granted, leaving no evidence whatever of the plaintiff's ownership of the note. *Chesbrough v. Tompkins.* 289

11. Under the Code, an order of arrest may be obtained in two classes of cases: in those where the cause of action is identical with the cause of arrest, and in those where facts *dehors* the cause of action constitute the cause of arrest. In the latter class of cases, unless an order of arrest is obtained before judgment,

no *ca. sa.* can issue; but if such order of arrest be obtained, and the defendant omits to move to set it aside, or fails in a motion so to do, he is concluded, after judgment, from questioning the right to an execution against his person. *Elwood v. Gardner.* 349

12. In the former class, the defendant may contest the right to arrest upon a preliminary motion to set aside the order, or contest the alleged cause of action upon the trial itself, and if at the trial, the plaintiff is permitted to abandon his cause of action as alleged, and to recover upon contract merely, he cannot have execution against the person although his order of arrest has not been set aside. *Id.*

13. In an action brought by the plaintiff to recover damages sustained by him in consequence of the false and fraudulent representations of the defendant, his indorser as to the solvency of a maker by which he was induced to accept a note with defendant's indorsement, an order of arrest was obtained upon an affidavit setting forth the same facts as the complaint. At the trial the plaintiff, having abandoned his action for the fraud, and taken judgment against the defendant as indorser merely, issued execution against the person.—*Held*, that the defendant had a right, though failing to set aside the order of arrest before judgment, to have the execution issued against the person of the defendant, vacated. *Id.*

14. Executions to sell real estate cannot be issued after the death of the defendant, without an opportunity for heirs and terretenants to be heard; and the judgment must be revived against them. *Wood v. Morehouse.* 368

15. But when an execution has been actually issued and partially executed, as by the commencement of the publication of notice of sale thereunder, the subsequent death of the debtor does not affect the process or prevent its complete execution by sale of the property. *Id.*

16. In the absence of proof to the contrary, it will ordinarily be presumed in favor of a sale under execution that the sheriff has duly posted the proper notices of sale, in accordance with the maxim, *omnia præsumuntur rite acta*. *Id.*
17. The publication of a sheriff's notice of sale of real estate under execution is sufficient, if inserted once in each week for the six weeks before the sale, although six full weeks should not have elapsed between the date of the first publication and the day of sale. *Id.*
18. The statute (2 R. S., 269, § 40), providing that the omission of the sheriff to give the notice of sale required should not affect the validity of the sale made to a purchaser in good faith without notice of the omission, applies to a sale to the judgment creditor, although he pays no money, and the amount of his bid is merely credited upon the execution. *Id.*
19. Where a junior judgment creditor applies to redeem to the assignee of the sheriff's certificate of sale, the acceptance of the money and transfer of the certificate by the assignee is a waiver of the production by the junior creditor of evidence of his right to redeem; and as the requirement of such production is for the benefit of the holder of the certificate, his waiver renders such production unnecessary to the validity of the sheriff's deed given to the creditor so redeeming. *Id.*
20. A sheriff may waive the recording of the assignment of certificate of sale, and give a deed to the assignee, without requiring it. *Id.*
21. A verified answer, which interposes a general denial to the complaint, is tantamount to a plea of the general issue under the former system of practice at law. Such answer gives to the defendant the right to require the plaintiff to establish by proof all the material facts necessary to show his right to a recovery. It cannot be stricken out as sham, although shown by affidavits to be false. *Thompson v. The Erie Railroad Company*. 468
22. Where the answer contains a general denial of several allegations of the complaint.—*Held*, that as to those allegations, the answer is as fully a general denial as is an answer denying the whole complaint, a general denial of all its allegations. The allegations denied must be met by proof, and such proof must, in such a case, as well as in that of a general denial of the whole complaint, be the common-law proof, which the defendant has the constitutional right to require. And this rule is applicable, whether the complaint sets up a claim formerly cognizable by a court of law, or one entertained only in a court of equity. *Id.*
23. The 247th section of the Code gives no power to order judgment upon a part of an answer as frivolous, where there is a part which is held good. If it is irrelevant, it may be stricken out as such, under section 152. And this relief may be granted on a motion for judgment for frivolousness, if there is a prayer in the notice of motion for "other or further relief." *Id.*
24. In an action by preferred stockholders against a corporation to compel the payment of a dividend alleged to be due, and charging that the funds applicable thereto have been diverted to the permanent improvements and additions of the road, the common stockholders may be proper, but are not necessary parties. *Id.*
25. An action was commenced by a grantor to restrain the carrying on by the grantee of a certain business in violation of the covenants in the deed, and for \$1,000 damages. The value of the property affected by this action was \$50,000.—*Held*, that an extra allowance of costs under section 309 of the Code could not be computed upon the value of the premises. *Atlantic Dock Company v. Libby*. 499
26. The former husband of the defendant, a resident of Massachu-

- setts, went to Illinois expressly to procure a divorce from her, commenced an action there in the proper court for that purpose, and she having appeared and permitted, by collusion with him, a decree of divorce to be granted against her, subsequently married the plaintiff here.—*Held*, in an action here, brought to annul the last marriage on the ground of the defendant's former marriage being still in force, that a complaint stating the above facts was insufficient, and a demurrer thereto must be sustained. *Kinnier v. Kinnier*. 535
27. The *lex loci* which is to govern married persons, and by which the contract is to be annulled, is not the law of the place where the contract was made, but where it exists for the time, where the parties have their domicil, and where they are amenable for any violation of their duties in that relation. *Id.*
28. An allegation in a pleading, that the judgment of another State is void by the laws of that State, is a statement of a conclusion of law and not a fact, and is not deemed admitted by a demurrer. *Id.*
29. To authorize a reversal of a finding of fact in this court, on the ground that there is no evidence to sustain it, it must appear that the case contains all the evidence. (GROVER, J.) *Cox v. James*. 557
30. The judgment upon an award under the statute can only be reviewed in this court by writ of error; an appeal will be dismissed. *Turnbull v. Martin*. 600
31. Motions to set aside verdicts as contrary to evidence, as well as motions for a new trial upon the ground of newly discovered evidence, are not governed by any well defined rules, but depend in a great degree upon the particular circumstances of each case. They are addressed to the sound discretion of the court, and the exercise of this discretion is not reviewable in this court. *Barrett v. The Third Avenue Railroad Company*. 628
32. The proceeding to punish for a contempt is a special proceeding, and falls within subdivision 3 of section 11 of the Code, and the order made is a final order in a special proceeding affecting a substantial right. Such an order is reviewable in this court. It is proper to entitle the papers as in the original action. *The Erie Railway Company v. Ramsey*. 637
33. It is irregular to include in the judgment rendered upon an appeal the amount of the judgment of the court below, thus making it a judgment for the amount of that judgment and the costs of the appeal. Where, however, judgment is entered in that form, payment of the amount thereof would operate not only as a satisfaction of such judgment, but of the judgment below included therein. *Beers v. Hendrickson*. 665
34. In an action concerning real property, the claim that the trial should be had in another county and by jury, is waived by omitting to make such claim on the trial. *The West Point Iron Company v. Reymert*. 703
35. Although costs in actions of foreclosure are in the discretion of the court, yet if it appears that such discretion has been exercised under an erroneous view of the law affecting the rights of the parties, it is the duty of the appellate court to correct the error. *Morris v. Wheeler*. 708
36. In an action upon a chose in action or demand belonging to a partnership, the surviving partner is the real party in interest, although, under an arrangement between the partners, the representatives of a deceased partner are entitled to the proceeds thereof. The test is, was it partnership property at the death of the deceased partner. If so, the debtor cannot insist that such representatives be made parties. *Daby v. Ericsson*. 786
37. The practice of receiving evidence subject to objection, and reserving the question of its admis-

sibility, on trials before referees, criticised. *Sharp v. Freeman*. 802

38. The addition of the words "per agreement" to the items of a bill of particulars, does not preclude proving and recovering the value of the services specified in such bill, although an agreement for the payment of a specified sum is not proved. *Robinson v. Weil*. 810

See ATTACHMENT.

FORECLOSURE, 5, 6.  
LIEN, 2.

### PRESUMPTION.

See ADVERSE POSSESSION.  
PAYMENT, 3, 4.

### PRINCIPAL AND SURETY.

1. In cases where, by the mere laches of the creditor, the surety's means of indemnity are impaired, his liability is discharged only to the extent of the loss sustained by reason of such laches. *Barhydt v. Ellis*. 107
2. Where the plaintiff's testator let certain premises by a lease to which he and the lessee alone were parties, in the body of which was inserted a written clause requiring him to give notice to the defendants, the sureties of the lessee, in case the rent should not be paid when due, who were thereupon to have the right upon payment of the rent, to take possession of the premises; and by the sureties' printed agreement signed by the defendants, and annexed to the lease, they agreed to pay upon default of the lessee without any notice of non-payment or proof of demand being made. — *Held*, that the two clauses were not inconsistent, and that the giving of the notice required by the lease, did not constitute a condition precedent to the recovery of the rent from the defendants, on failure of the lessee to pay it. *Id.*
3. It is the right of a surety to pay the debt and sue his principal, and one who, for value, transfers a

debt or security and becomes guarantor or indorser thereupon, can thus protect himself against the consequences of delay in enforcing the principal obligation. He cannot, by notice, impose upon the creditor or holder, the duty of active diligence, at the risk of discharging the surety by omitting it. *Wells v. Mann*. 327

4. One who guarantees the performance of a contract has the right, after default by his principal which would justify its termination, to require that the contract be terminated and the claim against himself, as surety be confined to the damages then recoverable. *Hunt v. Roberts*. 691

5. The defendant guaranteed the performance, on the part of C., of a building contract made by C. and the plaintiffs, wherein the plaintiffs agreed to perform the work by the 15th of October, and C. to furnish materials, and pay a certain sum. After October 15th, the work being unfinished, the defendant gave notice to the plaintiff, that if they did not complete the work before the 1st of November, he would not be responsible as guarantor thereafter. The plaintiffs kept on until June following, being delayed by C's failure to supply materials. The defendant, by an arrangement with a third person, and to which the plaintiffs were not a party, had assumed C's obligations, and, after November 1st, urged the plaintiffs to perform, and himself supplied materials, but stated to them that he would not be personally responsible. — *Held*, in an action on the contract of guaranty, that the effect of the notice was an extension of time for performance, and continued the defendant's liability as guarantor to November 1st only; and his liability was limited to the debt and damages which the plaintiffs were entitled to claim at that time. *Id.*

### PRINCIPAL AND AGENT.

1. Where the defendant, owning a city lot, had authorized C., a bro-



ker, to receive and communicate to him proposals for the sale of it, and C. had assumed to sell the property to the plaintiff, and sign a binding contract of sale.—*Held*, that it was essential to the validity of any alleged ratification of such sale, by letters of the defendant to the plaintiff, that they must have been written with full knowledge on the part of the defendant not only of the contract that the agent had made, but also substantially how it was made. *Rowan v. Hyatt*.

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### PRIVILEGED COMMUNICATIONS.

1. All communications made by a client to his counsel with a view to professional advice or assistance, are privileged, whether such advice relates to a suit pending or contemplated, or to any other matter proper for such advice or aid; but communications made in the presence of all the parties to the controversy are not privileged, and this exception includes a case where the communications were made by the plaintiff's assignor, in trust for creditors, in the presence of the defendant, to the attorney employed to draw the papers between them. *Britton v. Lorenz*.

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### PROMISSORY NOTE.

*See* BONA FIDE HOLDER, 1, 2.  
HUSBAND AND WIFE, 5, 6.  
PARTNERSHIP, 4, 5, 6.

### QUESTIONS OF LAW AND FACT.

1. Common carriers by land are ordinarily bound to deliver or tender the goods to the consignee at his residence or place of business; but where the consignee cannot be found with reasonable diligence, the common carrier may relieve himself from liability by depositing the property in a suitable place for the owner. When there is a con-

flict of evidence, reasonable diligence is a mixed question of fact and of law. *Witbeck v. Holland*. 13

2. Where the defendants received goods at Albany, to be delivered in New York, addressed to "McEntee, New York," and on their arrival the plaintiff demanded them and offered to pay the charges, but the defendant refused to deliver them, and defendant gave evidence tending to show that the refusal was coupled with an offer to deliver the goods, if the plaintiff would produce any paper showing ownership or authority to receive them.—*Held*, that it should have been submitted to the jury, whether the refusal was qualified; and if so, whether the qualification was reasonable and was the true reason for not delivering the goods. *McEntee v. New Jersey Steamboat Company*.

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3. It cannot be held, as a matter of law, that the lands embraced in a park are of no more value to the city than the same lands when devoted to the public use as streets, and an award of the damages sustained by the city, by reason of such conversion of park lands into streets, having been confirmed by the Supreme Court, in the absence of any legal error, is conclusive. *Matter of Ninth Avenue and Fifteenth Street*.

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*See* INSURANCE, LIFE.  
PAYMENT, 2.

### RAILWAYS.

1. Where the plaintiff purchased from the defendant, a railroad corporation, created by the laws of this State, at a station within this State, a passenger's ticket thence to the city of New York, and having taken passage in its cars to be carried thither, received injuries upon a portion of the road situated in the State of Pennsylvania, through the negligence of the defendant's servants,—*Held*, that the amount of damages for such injuries, recoverable by him, was not affected by a statute of Pennsylvania.

- nia limiting the amount of recovery in similar cases. *Dike v. The Erie Railway Company.* 113
2. *It seems* that the action in such cases, whatever its form, is based upon the contract. (ALLEN, J.) *Id.*
3. Although the twenty-second section of the general railroad act does not, in terms, declare that the commissioners appointed in pursuance of it shall have jurisdiction of the entire subject of the location of the route through the county in which the land of the person applying for their appointment is situated, still, that is the true intent and construction of the act. *In the Matter of the Long Island Railroad Company.* 364
4. The appointment of commissioners can only be made after all notices required by law have been duly served, and the fifteen days have expired within which the persons aggrieved may apply for such appointment. *Id.*
5. The commissioners first duly appointed shall have exclusive jurisdiction to examine and determine in respect to all objections to the proposed location; and that determination is final upon all questions relating thereto. *Id.*
6. The last paragraph of section 9, act of 1847, with reference to the liability of connecting railroads (chap. 270), does not apply to intermediate railroads, but only to the road which receives the goods. (PECKHAM, J. *contra.*) *Root v. Great Western Railway Company.* 524
7. Proceedings having been had to authorize the issue of bonds of a municipal corporation to aid in the construction of a railroad, under the act of 1869, requiring the county judge to determine certain facts and render judgment thereon (Laws of 1869, chap. 907, p. 2308), a writ of certiorari may properly issue to such county judge, for the purpose of a review of his proceedings by the Supreme Court, notwithstanding his determination has been entered of record. *The People ex rel. v. Smith.* 772.
8. Upon the return to such writ the court is not limited to the inquiry whether jurisdiction of the parties and subject-matter was acquired, but should examine the evidence and determine whether there was any competent proof of the facts necessary to authorize the adjudication made, and whether, in making it, any rule of law affecting the rights of the parties has been violated. *Id.*
9. In such proceedings, competent common-law evidence of the facts to be established should be produced before the county judge, and, as his determination is binding upon those who do not appear before him, no admission or other act done or omitted by those who contest the application can be regarded as evidence, or affect the rights of those not appearing. *Id.*
10. It is not sufficient that the signatures to the petition be proved, unless such petitioners are in some way identified as the persons named on the "last preceding tax list or assessment roll." If the names upon both are identical, that is *prima facie* evidence that the persons are the same; but the county judge may not act upon his personal knowledge, and, where initials only are given, additional evidence of identity is requisite. *Id.*
11. The authority conferred by the act must be exercised in strict conformity to and by a rigid compliance with the letter and spirit of the statute. *Id.*
12. The petition required is that of the tax-payers, and the act is not satisfied by the petition of an agent. The power conferred is personal, and cannot be delegated; and it is error to include as petitioners those whose names are affixed to the petition, in their absence, under a verbal authority given at some previous time. *Id.*
13. Where the defendant's railroad is carried across a public highway

in such manner and place that those traveling the highway can neither see nor distinctly hear approaching trains until too late to avoid collision with them, the company is liable for such collision, in the absence of negligence of those injured. *Richardson v. New York Central Railroad Company.* 846

14. Compliance with the statute as to sounding the whistle and ringing the bell is not the whole duty of the company, and will not excuse them in such a case. *Id.*

*See* COMMON CARRIERS.  
EVIDENCE, 19, 20, 21.  
NEGLIGENCE, 7, 10.

#### REAL PROPERTY.

*See* COVENANT, 1, 4, 5, 6.  
TITLE, 1, 2, 3, 4, 5, 6, 8, 9, 10,  
11, 12, 15.

#### REAL PARTY IN INTEREST.

*See* EVIDENCE, 24.  
PARTNERSHIP, 7.

#### RECEIVER.

*See* PRACTICE, 1.

#### RECOUPMENT.

*See* ACTION, 4.

#### PUBLIC OFFICERS.

1. The report or certificate of an officer is evidence only of facts which, by law, he is required or authorized to certify. *Board of Water Commissioners v. Lansing.* 19
2. Where appraisers are appointed to determine the value of property to be taken for public purposes, not only the examination must be had, but the determination must be made at a meeting, at which all are present. *Id.*

#### *See* ACKNOWLEDGMENT.

JUDICIARY, 2, 3.  
PRACTICE, 16, 20.

#### REDEMPTION.

1. The plaintiff holding a contract for the sale of certain lands, part of the purchase-price of which had been paid by him, transferred the contract to the defendant as security for any advances the latter might make to pay the balance due thereon; and the defendant having paid up the contract and taken a deed to himself, with the assent of the plaintiff contracted to sell a portion of the lands to G, receiving part payment. At the same time he agreed with G to advance him money to cut logs on the lot, the defendant to be repaid by taking the logs at agreed prices.—*Held*, in an action to redeem, brought by the plaintiff, that the defendant was not entitled, upon such redemption, to charge the plaintiff with any moneys advanced to G under the lumbering contract, but must convey to the plaintiff, and assign the contract with G and the logs on the land to him, upon being paid his advances to buy the land, less the amount received from G. *Kelley v. Falconer.* 42
2. Where a junior judgment creditor applies to redeem to the assignee of the sheriff's certificate of sale, the acceptance of the money and transfer of the certificate by the assignee is a waiver of the production by the junior creditor of evidence of his right to redeem; and as the requirement of such production is for the benefit of the holder of the certificate, his waiver renders such production unnecessary to the validity of the sheriff's deed given to the creditor so redeeming. *Wood v. Morehouse.* 368
3. A sheriff may waive the recording of the assignment of certificate of sale, and give a deed to the assignee, without requiring it. *Id.*

*See* ACTION, 1.

REFEREE.

*See FINDINGS OF FACT AND CONCLUSIONS OF LAW.*  
*PRACTICE, 37.*

SALE.

1. Where the defendant, owning a city lot, had authorized C., a broker, to receive and communicate to him proposals for the sale of it, and C. had assumed to sell the property to the plaintiff, and sign a binding contract of sale,—*Held*, that it was essential to the validity of any alleged ratification of such sale, by letters of the defendant to the plaintiff, that they must have been written with full knowledge on the part of the defendant not only of the contract the agent had made, but also substantially how it was made. *Rowan v. Hyatt.*  
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2. Upon a sale of goods, if the purchaser accept them after examination, or an opportunity for examination, he cannot afterward, in the absence of any fraud or warranty, upon being sued for the price, object that the property was not of the agreed quality. And this rule applies to a sale of all the goods of various grades at a particular place, quantity of each unascertained, to be paid for at fixed rates for the various qualities. *McCormick v. Sarson.*  
265

*See BILLS OF EXCHANGE, 1.*  
*BROKER.*  
*CAUSE OF ACTION, 12, 13, 14.*  
*MORTGAGE, 1, 2, 3.*  
*PRACTICE, 14, 15, 16, 17, 18.*  
*TITLE, 7.*

SALE OF INFANT'S REAL ESTATE.

*See CONTRACT, 12.*

SATISFACTION.

*See ATTORNEY AND CLIENT, 5, 6.*

SECESSION.

1. The acts of a *de facto* judge cannot be attacked collaterally, by showing that he has taken no oath of office, or that he has taken an oath to support a power in insurrectionary hostility to the federal government. *Pepin v. Lachenmeyer.*  
27
2. The secession of the State of Louisiana, attempted or temporarily effected, did not affect the jurisdiction of the civil courts of the State between citizens of that State. *Id.*

SHERIFF.

*See ARREST AND BAIL, 4, 5.*  
*ATTACHMENT, 2, 3, 4.*

SLANDER.

*See LIBEL AND SLANDER.*

SPECIFIC PERFORMANCE.

1. Upon decreeing specific performance of a verbal contract for the conveyance of real estate, upon the ground of part performance, the court will be governed by the same principles in adjusting the equities of the parties as upon a written contract, valid by the statute of frauds; and if the seller is not able fully to comply with the contract, the buyer has his election, either to have the contract specifically performed, so far as the seller can perform it, and to have an abatement out of the purchase-money, or compensation for any deficiency in the title, quality or other matters touching the estate. *Harsha v. Reid.*  
415
2. But a court of equity cannot give a personal judgment in damages against a defendant, for an independent cause of action growing out of a contract void by the statute. An existing equitable cause of action, for a specific perform-

ance, will not create and secure to the party an independent cause of action, which would not exist and could not be enforced but for the equitable right of action. *Id.*

3. Accordingly, in the case of an entire verbal contract for the purchase of land, and of a crop of flax growing thereon, under which the purchaser has entered into possession and made partial payments, in an action brought by him for specific performance, with an allegation of damages for breach of warranty as to the flax,—*Held*, that such damages were not recoverable. *Id.*

#### STATUTES.

- Code, § 182, *see* LIEN, 2.  
 187, ARREST AND BAIL.  
 247, PRACTICE, 23.  
 309, PRACTICE, 24.  
 399, WITNESS, 4, 5.  
 Foreclosure, MORTGAGE, 2.  
 1 Revised Laws, 369, *see* ACKNOWLEDGMENT.  
 2 Revised Statutes, 269, § 40, *see* PRACTICE, 18.  
 2 Revised Statutes, 466, *see* CORPORATIONS, 2.  
 Laws 1813, chapter 86, § 181, *see* NEW YORK CITY.  
 Laws 1847, chapter 270, *see* COMMON CARRIERS, 17, 18, 19.  
 Laws 1850, chapter 102, *see* JURISDICTION, 10.  
 Laws 1850, chapter 140, *see* PRACTICE, 18.  
 Laws 1853, chapter 467, *see* CONSTITUTIONAL LAW, 3.  
 Laws 1855, chapter 427, *see* ASSESSMENT AND TAXATION, 1.  
 Laws 1857, chap. 243, *see* ACTION, 2.  
 Laws 1858, chap. 326, *see* TITLE, 13.  
 Laws 1860, chapter 348, *see* ASSIGNMENT FOR BENEFIT OF CREDITORS.  
 Laws 1862, chapter 478, *see* MECHANIC'S LIEN, 3, 4, 5.  
 Laws 1867, chapter 814, *see* ANIMALS.  
 Laws 1870, chapter 175, *see* EXCISE, 1, 2.  
 United States Laws 1789, chapter 20, *see* PRACTICE, 8.  
 United States Laws, May 26, 1790, *see* EVIDENCE, 5.  
 United States Act of 1864, United

States Statute 99, *see* NATIONAL BANKS.

#### STATUTE OF FRAUDS.

1. A parol agreement by the defendant to take a share in the plaintiff's interest in a trading adventure, is valid and binding, although the only consideration passing from the defendant to the plaintiff for such share, or his right to take it, was the obligation to share in the losses. Upon such an agreement, the plaintiff may maintain an action against the defendant to recover contribution of the losses of the adventure. *Coleman v. Byre.*  
 38

2. The plaintiff's promise to account to the defendant for one-half of the profits, is supported by the obligation incurred by the defendant to share one-half of the losses, and hence it is a case of mutual promises, reciprocally binding. *Id.*
3. The agreement was not within the clause of the statute of frauds, requiring agreements for the sale of goods to be in writing. *Id.*
4. Where the plaintiff agreed verbally with the defendants, for the purchase of a quantity of cloths, no portion of the purchase-money being then paid, or goods delivered; but, subsequently, when by the first arrangement a payment became due, the parties again met, and upon further negotiations and agreements, varying somewhat the original void contract, the plaintiff delivered to the defendants, one F.'s promissory note, which was to be collected and applied by them on the purchase-price of the cloths, and he also consigned to them certain other merchandise, which they were to sell, and also apply the avails, after deducting their commissions, to the purchase-price of the cloths.—*Held*, that the minds of the parties must be deemed to have then met upon all the terms and conditions of the agreement, for the sale of the cloths, and that it then became by the plaintiff's transfer of the note

and consignments of merchandise, a valid and binding contract, under the statute. *Allis v. Read*. 142

See CAUSE OF ACTION, 4, 22.

## STATUTE OF LIMITATIONS.

See ACTION, 1, 8.

## STOCKS.

See BANKS AND BANKING, 1.  
BROKER.

## SUPERVISORS.

1. Where a board of supervisors has once considered a claim and audited and allowed it at a certain amount, a mandamus cannot issue to compel it to audit the claim anew and allow it at a greater amount, but where there are distinct and separate items in the account, the board of supervisors can no more wholly reject or refuse to audit one of those items which is a legal charge on the ground that it is not legal, than they can reject for that reason a whole account, and a mandamus will go to compel such audit. *The People v. Supervisors of Delaware County*. 196
2. What should be the form of a mandamus in such cases stated by FOLGER, J. *Id.*

See ASSESSMENT AND TAXATION, 25.

## TAXATION AND TAXES.

See ASSESSMENT AND TAXATION.

## TELEGRAPH COMPANIES.

1. It is gross negligence in the operator at a telegraph station to send over the wires a message in the name of, and purporting to come from a cashier of a bank and to be dated at another station, at the request of a party known to the op-

erator not to be such cashier, and presenting no evidence of authority to use his name, which message, addressed to a banking house, held out such party as entitled to credit for a large amount; and this negligence occurs so within the scope of the employment of such operator as to make the telegraph company liable to the person to whom such telegram was addressed for the damages occasioned by such negligence. *Elwood v. The Western Union Telegraph Company*. 549

2. The lines of two telegraph companies terminated at S., the one leading from O. to S., and the other from S. to R. Messages passing over the line of the former company for transmission beyond S. to R., were customarily received by the latter company. The plaintiff at O. sent a message to R., paying for the whole distance.—*Held*, that no partnership or mutual agency could be inferred from such facts. Each of the companies, in the absence of evidence of a special agreement or arrangement, either with the sender of the message, or between each other, will be liable for his own acts, but not for the acts and defaults of the other. *Baldwin v. The United States Telegraph Company*. 744
3. The rule of damages, recoverable for the non-delivery of, or mistake in delivering telegraphic messages is the natural and necessary consequence of the breach of contract as contemplated by the parties, interpreting the contract in the light of the circumstances under which, and the knowledge by the parties of the purposes for which, it was made, and when a special purpose is intended by one party, but is not known to the other and is not indicated by the message itself, such special purpose will not be taken into account in the assessment of damages for the breach of contract to send. The damages in such a case will be limited to those resulting from the ordinary and obvious purpose of the contract. *Id.*
4. An error in transcribing the direction, and a consequent misdo-

livery, is *prima facie* evidence of neglect and want of care in the operator, and casts the burden of proof upon the company of explaining the error and showing that it occurred without fault. *Id.*

5. A message was delivered to the operator at O., by the plaintiff, to be telegraphed to the plaintiff's agent at R., requesting such agent to telegraph back to the plaintiff the condition of certain petroleum oil wells at R., belonging to the plaintiff, and the operator was informed by the plaintiff, that unless an answer was received promptly he should sell the well at a certain sum, which had, to the knowledge of the operator, been offered him. The ordinary charge was paid for transmitting the message the whole distance, and it was transmitted to S., and there received by the defendant and by them transmitted over their line to R. By a wrong direction it did not reach the plaintiff's agent for some days afterward. The defendant's agent had no knowledge of the special purpose of the message. The plaintiff, receiving no response, sold at the offer. It afterward appeared that the well was worth, and could have been sold at a higher price.—*Held*, that the defendant was not liable for this difference, nor for any damages arising from an under sale by the plaintiff. *Id.*

#### TENDER.

See *BROKER*, 8.

#### TITLE.

1. A municipal corporation was, by an act of the legislature, authorized to take lands for a public park, and the act declares that the lands so to be taken shall be a public place; and provides that in ascertaining the compensation to be paid the owners, a just and true estimate of the value of the lands is to be made, together with the tenements, hereditaments and appurtenances, privileges and advan-

tages to the same belonging, without deduction for benefits and advantages; and declares that on fulfilling the requirements of the act, the lands shall vest forever in the city, and that whenever the city shall become vested with the title to the park, as provided, it might sell any building improvement or other material thereon; and authorizes the issue of bonds by the city, to obtain the fund to pay for the lands taken, declaring the lands pledged for the payment of such bonds.—*Held*, that the city acquired an absolute estate in the lands taken under this act, and not an easement, and that such title was free from any legally recognizable reversionary right in the owners. *Brooklyn Park Commissioners v. Armstrong.* 234

2. The title of the city, thus acquired, is impressed with a trust to hold the lands for the public use as a park, and it cannot, of itself, convey or dispose of them in contravention of the trust; but it is within the power of the legislature to relieve the city from such trust, and to authorize a sale, free therefrom. *Id.*
3. The right to discontinue the public use of land thus taken and to sell it to private parties, under the sanction of the legislature, exists, notwithstanding the fact that such abandonment and sale will lessen the value of surrounding property, which has been assessed for the benefit and advantage to it, for the maintenance of such use. There is no contract in such cases with the owner of such adjacent property to maintain the use. *Id.*
4. Bonds having been issued and used to raise funds for the compensation paid for the land.—*Held*, that the terms of the act and the issue of the bonds, constituted a contract between the bondholder of the one part, and the city and the State on the other, specifically pledging the land taken for the payment of the bonds, and that a subsequent act of the legislature authorizing a sale of any portion of the park free of all liens existing by virtue of the original act, was in violation of

the federal constitution, as impairing the obligation of contracts.—*Held*, further, that a provision that the avails of the sales so authorized, should be held as a sinking fund, for the redemption of the bonds when due, did not avoid the objection. *Id.*

5. If a purchaser may sometimes be compelled to take a title, free from reasonable doubt, notwithstanding an objection not certainly and beyond all possible question unfounded; yet when it is ascertained that there is a defect, he may refuse, however remote the probability of his ever being incommoded thereby. *Id.*

6. An action will not lie against an owner of land who, in digging a well upon his own premises, intercepted the percolation or underground currents of water, and thereby prevented their reaching the springs or open running stream on the soil of another. The rule is different when the water has actually reached, and become a part of, the spring or stream, and subtracted from it. *The Village of Delhi v. Youmans.* ✓ 362

7. By the larcenous taking of chattels, the owner is not divested of his property, and a transfer to a *bona fide* purchaser does not impair his rights. The owner may follow and reclaim them wherever he can find them, and a carrier or other bailee can stand in no better situation than a purchaser who has received them in good faith and for full value. When the goods have been stolen, no question of negligence or estoppel of the owner thereby can arise. *Bassett v. Spafford.* 387

9. The parents of an infant of six years, made and executed a quit-claim deed of certain real estate to her, which was recorded. Subsequently the parents executed a deed of the same property in trust to the appellant, under which trust he made large advances of money. The mother's name was signed to this deed by the infant (then being about sixteen years of age), at the request of the mother.—*Held*, that

in the absence of intentional fraud upon her part, the infant would not be estopped by this act from claiming title under her previous deed. *Spencer v. Carr.* 406

9. In case of a grantee only six years of age, where the grant is beneficial, an acceptance of the deed will be presumed. ✓ *Id.*

10. Where the owners of lands cause them to be surveyed and subdivided into lots for building purposes, and a map thereof to be made, upon which the lots were designated by numbers, and abutted at one end upon a strip designated as an alley, and such owners subsequently conveyed one of the lots, describing it by number on a map, specifying the map above mentioned, and specifying the boundaries as abutting at one end on the north line of such alley, as laid down in the map,—*Held*, that this conveyance gave to the grantee a right of way over the alley to the rear of his lot, as against his grantors and their subsequent grantee of the alley. *Cox v. James.* 557 ✓

11. In an action involving the title to lands, the defendant who is in possession under a quit-claim deed, cannot dispute the seizin of his grantor, at the time of giving the deed. *Id.*

12. A deed with covenants for quiet enjoyment contained the following clause: "Reserving always a right of way as now used, on the west side of the above described premises, for cattle and carriages, from the public highway to the piece of land now owned by R."—*Held*, that, although strictly a *reservation* in a deed is ineffectual to create a right in any person not a party thereto, yet there being, in fact, a right of way existing, at the time of the grant in R., such clause must be construed as an *exception* from the property conveyed; and that the grantor was not liable to the grantee as for a breach of his covenant. *Bridger v. Pierson.* 601 ✓

13. S. was the owner and, in possession of a quantity of petro-



leum at his factory. His superintendent signed and delivered to him the following receipt: "Received on storage for account of S., 600 barrels petroleum, crude and refined, contained in tanks, and 700 barrels to hold the same, deliverable to his order on payment of the charges named therein, in accordance with the marginal note below. Storage, per month. Labor, No oil was set apart as covered or described by this receipt. This instrument S. transferred, by indorsement to B., for full value, as collateral security to a loan, the property all the while remaining at the factory. Subsequently, a levy was made by the defendant, as sheriff, under an execution against S., upon it. After the levy, S. with the consent of B., sold and delivered part of the goods to the plaintiff, who knew nothing of the receipt or its transfer, but supposed he was buying of S. They were retaken from him by the defendant.—*Held*, in an action against him therefor, that such a receipt was not a warehouse receipt under the statute (Laws of 1858, chap. 326), and the plaintiff could not recover. *Yenni v. McNamee*. 614

14. Between S. and his superintendent the instrument was a nullity. As between S. and B., it was in the nature of a chattel mortgage, and that being unrecorded, and the possession remaining in S., it was void as against creditors, and the levy made afterward was good. (GROVER, J.) *Id.*

15. A reservation in a deed will not give title to a stranger, but it may operate, when so intended by the parties, as an exception from the thing granted, and as notice to the grantee of adverse claims as to the thing excepted or "reserved." *The West Point Iron Company v. Reymert*. 703

See CAUSE OF ACTION, 11, 22.  
PRACTICE, 14, 15, 16, 17, 18, 19, 20.  
WILL.

#### TRADE MARK.

See CAUSE OF ACTION, 7, 8, 9.

#### TRIAL.

1. It is not error for the court to exclude an offer of evidence which, with the evidence already given, would be insufficient to establish the fact which it is intended to prove. An offer of testimony is to be presumed to include all that the party proposes to offer in addition to what they have already shown upon the particular issue. *Pepin v. Lachenmayer*. 27

2. A general exception to a refusal to charge what is improper, in part, is not good as to the correct part of the request. It is not the duty of the judge to separate the good from the bad. *Willetts v. Sun Mutual Insurance Company*.

3. A general exception to all the charge so far as it did not conform to several written requests previously handed up is unavailing. *Requa v. City of Rochester*. 129

4. Where the plaintiff, a woman, sixty-four years old and lame, was crossing Third avenue, in New York city, at ten o'clock in the morning, and the driver of a cart, going at the rate of four miles an hour, when at a distance of twelve feet from the plaintiff, called to her, which call was heard by persons more distant from the cart than the plaintiff, but the plaintiff nevertheless kept on, and was run down and injured.—*Held*, that a charge by the court to the jury, to the effect that the plaintiff was only required to look ahead along the crossing, and if, in so looking, she discovered no obstacle, then she was not negligent in proceeding to cross, was erroneous. *Barber v. Savage*. 191

5. Upon a criminal trial, the presiding judge has no right, in charging the jury, to allude to the fact that the prisoner has not availed himself of the statutory privilege of being a witness in his own behalf; but where such allusion is made, and subsequently, upon his attention being called to it, he states to the jury that there was no law requiring the prisoner to be sworn, and no inference to be drawn

against him from the fact of his not being sworn.—*Held*, that this cured the error. *Ruloff v. The People*. 218

6. An error in the charge of the court to a jury is not cured by a retraction of the charge, upon exception being taken to it, where such retraction is accompanied by the remark of the judge "that he had no doubt of the propriety of it" (the original charge). *Meyer v. Clark*. 285

7. Where a witness for the plaintiff was, at the time of the transaction in litigation, in the employment of the plaintiff, and about whose acts in such employment the controversy arose.—*Held*, error to instruct the jury, that, upon the question of his credibility, the jury might take into consideration his continued employment by the plaintiff after the transaction, and that the retraction by the judge of this instruction (when excepted to), with the remark that he had no doubt of its propriety, did not cure the error. *Id.*

8. If a court in a criminal case, entertains and decides a material legal question, fundamental in its character, the decision of which is excepted to before impanneling the jury, and the parties act upon it, such decision should be deemed incorporated into the proceedings on the trial; or, in other words, a part of the trial itself. In such a case, where an objection is taken at the time, it is unnecessary to renew the objection afterward. *Starin v. The People*. 338

9. The defendant, a stock company, was formed, and A., one of its projectors, subscribed for certain shares of its stock. He employed L. to dispose of stock in the company. The plaintiff, a purchaser from L., sought to rescind his contract of purchase, and to recover from the company the money already paid by him, on the ground of L.'s fraudulent misrepresentations. On the trial, evidence was offered tending to show that the projectors of the company had agreed to subscribe for its whole stock; that A. had no

authority to act as its agent, and that any stock ordered by him to be sold was only such as he had subscribed for. This evidence was controverted.—*Held*, that it was error for the court to take from the jury the question of ownership, and whether L. was merely the agent of A., or was also agent of the company.—*Held*, further, that if the plaintiff had purchased stock owned by A., he could not maintain an action against the company for the recovery of money paid for the stock. *Kelsey v. Northern Light Oil Company*. 505

10. The company, in its prospectus, set forth a description of ten tracts of land, or interests in land, which it proposed to purchase. It purchased eight of those specified, but was unable to secure the other two on account of defect in the title.—*Held*, that in an action brought for fraud in the representations of the prospectus, it was error for the court to charge, if upon the prospectus the plaintiff had a right to believe that it was reasonably certain that the company would acquire the property, and that the company was organized with a view to the ownership of those pieces of property, then, if it did not obtain them, the plaintiff would be entitled to recover. *Id.*

See EVIDENCE, 16, 17.

INSURANCE, FIRE, 2.

INSURANCE, LIFE.

LANDLORD AND TENANT, 4.

PAYMENT.

PRACTICE, 10, 14.

QUESTIONS OF LAW AND FACT, 2.

## TRUSTS AND TRUSTEES.

1. An antenuptial contract was entered into, whereby the husband was appointed trustee of real and personal property, and as such trustee was to have the entire and sole management, direction and control thereof, but it was silent as to the persons to be beneficially interested in the trust.—*Held*, that no trust was constituted, which the court could execute. *Dillays v. Greenough*. 488

2. *It seems*, that when the instrument creating the trust does not disclose the beneficiary, it does not necessarily result that the creator of the trust is such beneficiary. *Id.*

*See* BROKER, 1.  
 • CORPORATION, 1.  
 EVIDENCE, 6, 7.

## VENDOR AND PURCHASER.

1. When personal property is sold with an express or implied warranty of title, the rule is the same as to eviction as upon a covenant for quiet enjoyment in deeds of real estate. A party, however, holding under a covenant for quiet enjoyment, when evicted, may maintain an action against his immediate vendor, or may, at his election, proceed against a remote grantor who has conveyed the land with similar covenants. In the case of personal property, the vendee can only resort to his immediate vendor; there is no privity of contract between the last vendee and a remote vendor. *Bordwell v. Collie*. 494

2. A contract for the purchase and sale of shares of the stock of a railroad corporation, at a specified price, "payable and deliverable, seller's option, in this year, with interest at the rate of six per cent per annum," effects a sale *in present*, the vendor becoming a quasi trustee for the purchaser, and the latter is entitled to all dividends accruing on such shares thereafter. *Currie v. White*. 822

3. When the vendor gives notice, within the time, of his option to deliver, the rights of the parties become the same as though the time of delivery named by him had been specified in the original contract. *Id.*

4. If the purchaser, pursuant to such notice, at the time named therein, offers and is ready to take and pay for the stock, and the vendor neglects to deliver or offer to deliver, a tender of the money is not ne-

cessary, as payment and delivery are to be simultaneous. *Id.*

5. Assuming the power of the directors of a corporation to increase its capital stock, and to require the deposit or payment of money by subscribers to the new stock, such vendor is not bound to advance his own money for the purpose of preserving the right to the new shares which attached to the shares so sold. Unless the purchaser provides him with the means, he cannot claim that it is the fault of the vendor, that the stock purchased has not been increased. *Id.*

6. If the purchaser makes distinct and separate demands, one for the shares purchased, with dividends accrued thereon, the other for the additional shares of new stock, he may recover the subject of the former demand, although not entitled to that of the latter. (*ALLEN and FOLGER, J.J., contra.*) *Id.*

*See* BILLS OF EXCHANGE, 1.  
 CAUSE OF ACTION, 1, 2.

## WAIVER.

One of full age and acting *sui juris*, can waive a statutory, or even a constitutional provision in his favor, affecting simply his property or alienable rights, and not involving considerations of public policy. *Phyfe v. Himer*. 102

*See* PRACTICE, 2, 3, 20, 34.

## WAREHOUSE RECEIPT.

*See* TITLE, 14, 15.

## WAREHOUSEMEN.

*See* COMMON CARRIERS, 7, 8.

## WATER COURSES.

*See* CAUSE OF ACTION, 11.

## WILL.

1. Lands were specifically devised to J. for life, and on his death to his children. By the residuary clause of the will, all the "rest, residue

and remainder of the testator's property and estate, real and personal, whatsoever and wheresoever situated, and not therein and thereby specifically devised or bequeathed, he gave, devised and bequeathed" to certain residuary devisees and legatees. J. having died unmarried in the lifetime of the testator,—*Held*, that the lands in which a life estate was devised to him, passed under the will to the residuary devisees, and not to the heirs-at-law. *Younge v. Younge*. 254

2. Under the Revised Statutes (2 R. S., § 5), changing the common-law rule, a will whose introductory clause expresses a desire to make a suitable disposition of such worldly property and estate as the testator shall *leave behind him*, the residuary devise expressly devising all his real estate not before specifically devised, carries all after-acquired lands belonging to the testator at the time of his death. *Id.*

3. Where the testator charges the payment of his debts upon certain specified real estate, and, if that shall prove insufficient, then upon his other real estate,—*Held*, as between the legatees and the devisees, the personal estate was exonerated from the debts. *Id.*

## WITNESS.

1. In showing inconsistent statements out of court, the usual form is to ask the precise question put to the principal witness, whose credibility is attacked; but the practice in this respect is to some extent under the control and discretion of the court. *Sloan v. New York Central Railroad Company*. 125
2. The question to the attending physician of the plaintiff, whether she had the venereal disease while under his care.—*Held*, properly excluded. *Id.*
3. The general rule is well settled, that, where unimpeached witnesses testify distinctly and positively

to a fact, and are uncontradicted, the jury are not at liberty to discredit their testimony when opposed to a mere presumption to the contrary; but this is subject to the exception that where the statements of the witness are grossly improbable, or he has an interest in the question at issue, courts and juries are not bound to refrain from exercising their judgment, and to blindly adopt the statements of such witness. (RAPALLO, J.) *Elwood v. The Western Union Telegraph Company*. 549

4. The person through whom a party to an action derives title is not competent as a witness to prove transactions with a deceased person, as against the *grantees* of the latter. Although grantees are not named, they are within the reason of the act (Code, § 399), and the word "assignee" must be held to include them. *Mattoon v. Young*. 696

5. Under the amendment of 1867, if the interest formerly owned by such witness might be affected by the event of the action, he was incompetent, even though (as a grantor without covenants) he would have been competent at common-law. *Id.*

## WRITS OF ERROR AND CERTIORARI.

1. Upon the return of a writ of error to the Oyer and Terminer, the Supreme Court has no power to order the cause to be heard on the reporter's minutes taken upon the trial against the objections of the prisoner, although no bill of exceptions had been made or returned. *Messner v. The People*. 1
2. The judgment upon an award under the statute can only be reviewed in this court by writ of error; an appeal will be dismissed. *Turnbull v. Martin*. 600
3. Proceedings having been had to authorize the issue of bonds of a municipal corporation to aid in the

construction of a railroad, under the act of 1869, requiring the county judge to determine certain facts and render judgment thereon (Laws of 1869, chap. 907, p. 2308), a writ of certiorari may properly issue to such county judge, for the purpose of a review of his proceedings by the Supreme Court, notwithstanding his determination has been entered of record. *The People ex rel. v. Smith.* 772

4. Upon the return to such writ the court is not limited to the inquiry whether jurisdiction of the parties and subject-matter was acquired, but should examine the evidence and determine whether there was any competent proof of the facts necessary to authorize the adjudication made, and whether, in making it, any rule of law affecting the rights of the parties has been violated. *Id.*

*Ex. v. J. J. J.*

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